Ireland

1822 – 1940

CROWN AND PRESENTMENT

CASES.

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CASES, CHIEFLY RELATING

TO THE

CRIMINAL

AND

PRESENTMENT LAW,

RESERVED FOR CONSIDERATION,

AND DECIDED BY THE

TWELVE JUDGES OF IRELAND,

FROM MAY 1822, TO NOVEMBER 1840.

BY ROBERT JEBB, ESQ.,
BARRISTER AT LAW.

DUBLIN:
ANDREW MILLIKEN, GRAFTON-STREET,
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PREFACE.

The delay which has occurred in the publication of the following Work, since the first advertisement of it, has not been owing to the Editor, but to the intervention of impediments which he could not have foreseen.

The materials from which it has been compiled are, though somewhat scanty, of the very highest authenticity. In the few instances in which the Editor has been enabled to furnish at any length the *reasons* upon which the decisions were founded, his information has been derived from notes made by the late Mr. Justice *Jebb;* an advantage which ceased upon the death of that learned Judge in 1834.

The Criminal and Presentment Laws have undergone such frequent and important changes within the last few years, that it was a matter of great perplexity in several instances to determine whether particular cases should be rejected from this publication, as having been decided on statutes either expressly or impliedly repealed, or should be retained, as applicable to the provisions of the new laws, which are in so many instances re-enactments (with slight variations) of the old. Several cases have accordingly been excluded, as palpably useless under the present law; and others have been retained, which perhaps it may be thought should have been excluded; but considering the dearth of authorities upon the Irish Criminal and Presentment Laws,

(especially the latter) it was thought unadvisable to reject any case which, though decided on an obsolete statute, might possibly bear upon enactments now in force. The reader's attention has, whenever it appeared necessary, been called by notes to the distinctions between the present and the former law.

The cases relating to the Registry of Voters under the Reform Act have been omitted, as Mr. *Alcock* has already given them to the public. For a similar reason none of the decisions upon Civil Bill Appeals, except those of very recent date, have been inserted in this publication. With respect to the arrangement of the cases, it was found impracticable to attempt any other classification than the chronological; but the index at the end of the volume will make a reference to any of the subjects easy and expeditious.

Dublin, May, 1841.

JUDGES AND LAW OFFICERS,

DURING THE PERIOD OF THESE REPORTS,

WITH THE

DATES OF THEIR PATENTS.

JUDGES OF THE COURT OF QUEEN'S BENCH.

Right Hon. Charles Kendal Bushe, C. J. (February 20, 1822).
Hon. Richard Jebb (December 1, 1818).
Hon. Charles Burton (December 2, 1820).
Hon. Thomas B. Vandeleur (March 4, 1822).
Hon. Philip Cecil Crampton (October 21, 1834).
Right Hon. Louis Perrin (August 31, 1835).

JUDGES OF THE COURT OF COMMON PLEAS.

Right Hon. Lord Norbury, C. J. (December 20, 1800).
Right Hon. Lord Plunket, C. J. (June 18, 1827).
Right Hon. John Doherty, C. J. (December 23, 1830).
Hon. Arthur Moore (July 23, 1816).
Hon. William Johnson (October 25, 1817).
Hon. Robert Torrens (July 10, 1823).
Right Hon. Nicholas Ball (February 23, 1839).

BARONS OF THE COURT OF EXCHEQUER.

Right Hon. Standish O'Grady, afterwards Lord Guillamore, C. B. (October 14, 1805).
Right Hon. Henry Joy, C. B. (January 6, 1831).
Right Hon. Stephen Woulfe, C. B. (July 20, 1838).
Right Hon. Maziere Brady, C. B. (1840).
Hon. Sir William C. Smith, Bart. (December 27, 1801).
Hon. James M'Clelland (November 4, 1803).
Hon. Richard Pennefather (February 1, 1821).
Hon. John Leslie Foster (July 13, 1830).
Right Hon. Michael O'Loghlen (November 10, 1836).
Right Hon. John Richards (February 3, 1837).

ATTORNEYS GENERAL.

Right Hon. William C. Plunket (January 15, 1822).
Right Hon. Henry Joy (June 18, 1827).
Right Hon. Francis Blackburne (January 11, 1831).
Right Hon. Louis Perrin (April 29, 1835).
Right Hon. Michael O'Loghlen (August 31, 1835).
Right Hon. John Richards (November 10, 1836).
Right Hon. Stephen Woulfe (February 3, 1837).
Right Hon. Nicholas Ball (July 11, 1838).
Right Hon. Maziere Brady (February 23, 1839).
Right Hon. David R. Pigot (1840).

SOLICITORS GENERAL.

Henry Joy, Esq. (March 1, 1822).
John Doherty, Esq. (June 18, 1827).
Philip C. Crampton, Esq. (December 23, 1830).
Michael O'Loghlen, Esq. (October 21, 1834, and April 29, 1835).
Edward Pennefather, Esq. (January 27, 1835).
John Richards, Esq, (September 21, 1835).
Stephen Woulfe, Esq. (November 10, 1836).
Maziere Brady, Esq. (February 3, 1837).
David R. Pigot, Esq. (February 11, 1839)
Richard Moore, Esq. (1840).

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ADDENDA ET CORRIGENDA.

Page 21, last line but one, in the marginal note, after "such an indictment," read "under the 19 G. 2, c. 13"

—— 24, line 14, (in the note) for "in" read "is"

—— 35, in the note, *dele* the words "the first item in the list applies now only to the case of a traverse for damages, in consequence of s. 133 of 6 & 7 W. 4, c. 116." (See p. 224, note *a*.)

—— 40, line 9, (in the heading) after "road" read "presentment"

—— 41, in the last paragraph of the marginal note, for "the Clerks of the Crown are" read "the Clerk of the Crown is"

—— 49, line 2, for "committed. The" read "committed, the"

——113, line 4 from the bottom, in the marginal note, *dele* "a"

——241, line 3 in the marginal note, for "passing" read "forging"

MEMORANDA.

The Bill (mentioned in page 72, note) which had been brought into Parliament to extend the 19 & 20 G. 3, c. 37, to the County of the City of Dublin, has since passed into a statute. The Act is the 4 Vic. c. 10.

No Act has yet been passed (in conformity with the Bill mentioned in page 182, note) extending the 6 & 7 W. 4, c. 116, to the County and County of the City of Dublin.

CASES

RESERVED FOR CONSIDERATION,

AND DECIDED IN

THE KING'S BENCH CHAMBER.

RESOLUTION OF THE TWELVE JUDGES OF IRELAND AS TO HEARING COUNSEL ON RESERVED CROWN CASES. (*a*)

At a meeting of the twelve Judges in Hilary Term, 1826, it was agreed, that the English practice should be adopted of hearing counsel on reserved crown cases, when the Judge who tried the case should desire it.

For the purpose of ascertaining the English practice, *Bushe*, C. J., wrote to the Lord Chief Justice of England, who informed him of the particulars of that practice. The summary of it is, that if the Judge who reserved the case thinks it of such a nature that counsel should argue it, it generally is argued by one counsel on each side; the argument is in open court, but the Judges do not deliver any opinion in court; the opinion is made known by the Judge who presides at the next assizes or sessions, as in cases where counsel are not heard.

(*a*) Extracted from a M.S. note-book of the late Mr. Justice Jebb.

May, 1822.

THE KING *v.* HEFFERNAN.

An indictment under the 27th G. 3. c. 15, s. 10, will be sustained by evidence of supplying ammunition to a person who only pretended to get it for the use of the Whiteboys.

THE prisoner was tried before *M'Clelland*, B., at a special commission held in the city of Cork, in February, 1822, upon an indictment founded upon the 10th section of the 27 G. III. c. 15, for supplying ammunition contrary to the provisions of that act (*a*). The first count charged that divers ill disposed persons had confederated and agreed feloniously to seize forcibly all arms belonging to his majesty's faithful subjects, and that the prisoner feloniously did knowingly and voluntarily supply to one *William Fleming* 14 pounds of gunpowder, bullets and flints, for the purpose of assisting said confederates in the execution of said offence. The second, third, fourth, fifth, sixth, seventh, and eighth counts, varied from the first only in the statement of the objects of the confederacy, viz. to levy contributions from his majesty's subjects, and to cause by threats arms to be delivered; and the ninth, tenth, eleventh, and twelfth counts charged, that the prisoner supplied *Fleming* with the powder, &c., for the purpose of assisting divers ill-disposed persons to seize arms, to levy contributions, &c.

It appeared in evidence on the trial, that the country was in a disturbed state, and that the magistrates of Cork and its vicinity, suspecting the prisoner to be engaged in selling gunpowder to the *Whiteboys*, employed *Fleming*

(*a*) This enactment is still in force, as far as relates to the offence of supplying ammunition; though that part of the same section which relates to the seizing of arms, or levying contributions, is repealed by 1 & 2 W. 4. c. 44. (See *Rex* v. *Maguire*, *post.*)

to apply to the prisoner for gunpowder, which he accordingly did, calling at the prisoner's shop at nine o'clock at night, for that purpose. The prisoner asked him for what purpose he wanted the powder, and he answered, "for the use of the *Whiteboys*." He then got from the prisoner two pounds of powder, and agreed with him for a cask for the use of the *Whiteboys*. In a second interview, the prisoner said it would be dangerous to give a cask of powder, and he therefore gave *Fleming* 14 pounds in different parcels, and some bullets and flints. Upon these two occasions the prisoner suggested to *Fleming* the expediency of forming committees to superintend the business of the *Whiteboys*, and to take measures for a general rising.

O'Connell, for the prisoner, contended that on this evidence no conviction could take place, for that to constitute the crime laid in the indictment it is not sufficient that the prisoner should have supplied the ammunition with intent to aid the *Whiteboys* to commit the offences specified in the act, or some of them; but the person who received said ammunition must also have agreed and have intended to use and apply the ammunition to such purpose; and that in this case although the jury should be of opinion that the prisoner supplied the ammunition with the view and purpose laid in the indictment, yet as *Fleming* never agreed or intended to apply the ammunition to such purpose, the jury ought to be directed to acquit the prisoner. The learned Baron, with the approbation of *Moore*, J., (who was associated with him in the commission,) told the jury, that before they could convict the prisoner, they must be satisfied, first, that such confederacy existed as was laid in the indictment, and secondly, that

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the prisoner, knowing of such confederacy, did supply the ammunition to *Fleming* for the purpose of aiding and assisting the confederates in the execution of the offences, or some of them, laid in the indictment; that in his opinion the assent or agreement of *Fleming* to such purpose was not necessary to complete the crime of the prisoner, but that his criminality must depend on his *own* acts and intentions; and that if they were satisfied that the prisoner supplied the ammunition to *Fleming* with the view and for the purpose of assisting the *Whiteboys* to commit any of the offences laid in the indictment, they ought to find the prisoner guilty, although they were satisfied *Fleming* never intended or agreed to apply the ammunition to any such purpose. The jury found the prisoner guilty, and the learned Baron reserved for the opinion of the Judges the question as to whether his directions to the jury were right in point of law, or whether he should have directed them as required by the counsel for the prisoner.

The TWELVE JUDGES unanimously ruled that the conviction was legal, and that the case was within the statute. They held that the word "purpose" in sec. 10, meant "intent" or "design" of the person supplying the ammunition, and that "supply" meant "give" or "furnish;" and that it was not necessary that the person *receiving* should concur in the purpose, nor that the purpose should be completed.

THE KING *v.* RYAN, AND OTHERS.

May, 1822.

A man jointly indicted with others, and who has pleaded not guilty, cannot be a witness for the prosecution, whilst his plea stands.

At the *Dundalk* Summer Assizes in 1821, *Peter Coddington*, *John Ryan*, and *Owen Matthews*, were jointly indicted for burglary, and at the same assizes they were respectively arraigned, and severally pleaded not guilty; their trial however was then postponed on motion on the part of the Crown. At the Spring Assizes in 1822, the trial came on before *Johnson*, J., and *John Ryan* and *Owen Matthews* only were given in charge, and the jury were sworn on the issue joined by them with the Crown. After the prosecutor had been examined, *Peter Coddington*, whose plea of not guilty had not been withdrawn, was produced as a witness for the Crown. He was examined, and the prisoners then on trial, *Ryan* and *Matthews*, were found guilty. The learned Judge respited the judgment, until the Judges should have determined the question as to the competency of *Coddington* as a witness.

It was unanimously held by ELEVEN JUDGES (VANDELEUR, J., being absent from illness) that the conviction was bad, and that the witness ought not to have been received. It was agreed, that no case could be found, where an accomplice, he being himself comprised in the same indictment, and his plea of not guilty remaining of record, had been admitted as a witness. The objection appeared to JEBB, J., to rest, not so much on the incompetency of the witness, as on a rule of practice, adopted partly from analogy to the doctrine of approvement, and partly on this ground, that being a party to the record, he shall not be examined, while the record, so far as it concerns him, is

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undecided. The following authorities were discussed and considered: 1 Hale's P. C. 303; Cas. Temp. Hardw. 154; 2 Camp. 333, note; 5 Esp. 154; 1 Strange 663; 8 East, 41; 2 B. Moore, 9; 8 Taunt. 139; 7 T. R. 610; Bull. N. P. 308; 2 Hawk. P. C. c. 46, ss. 90, 91.

At the ensuing Summer Assizes, JEBB, J., delivered the opinion of the Judges, and further declared their opinion that the prisoners should not be indicted again for this crime, their lives having been once in jeopardy.

May 22, 1822. The KING, at the Prosecution of the Governors of the ROYAL HOSPITAL, *v.* MICHAEL KEEFE.

An indictment under the 46 G. 3, c. 69, s. 8, for personating J. H. (a deceased person) "the said J. H. "being then "and there "a person supposed to be "entitled," (or, "being a "person entitled,") "to a certain "pension," is bad.

THE first count of the indictment, which was founded upon the 46 G. III. c. 69, s. 8, (*a*) charged that the prisoner, "on the 10th of October in the second year of the reign, "knowingly and feloniously did personate and falsely "assume the name and character of one *Jeremiah Healy*, "the said *Jeremiah Healy being then and there a person "supposed to be entitled* to a certain pension, allowance, "and relief, to wit, a pension, &c. at the rate of 1*s.* 1½*d.* "a day, as a soldier theretofore in the service of our Lord "the King, to wit, in the 12th Veteran Battalion, who

Semble, that a good indictment might be framed for personating a deceased man in order to receive a pension, although the person applied to for the pension knew that the party personated was dead.

(*a*) This act is no longer in force; but similar provisions are contained in the 7 G. 4, c. 16, s. 38, and the 2 W. 4, c. 53, s. 49.

" had theretofore been entitled to his discharge, and been " discharged by reason of the expiration of the period of " service fixed by his majesty's orders for the soldiers in " the said battalion, to wit, at, &c., in order to receive " the same pension, allowance, and relief, in contempt of " our said Lord the King and his laws, against the peace, " and the statute in such case," &c.

The second count stated *Jeremiah Healy* to be a "*person* " *entitled* to a certain pension of £5 2*s.* 4½*d.* being for a " certain number of days, to wit, ninety-one days, from " the 25th of September, to the 24th of December, 1821, " at 1*s.* 1½*d.* per day." The third count was the same as the first, except that it stated the intent to be, "in order " to receive a part, to wit, a sum of £5 2*s.* 4½*d.* part of " the said last-mentioned pension, &c., and which part " was then and there payable in advance, that is to say, " for and on account of a certain number of days, to wit, " ninety-one days, from 25th September, to 24th December, " 1821."

The trial came on before *Lefroy*, Serjt., at the Spring Assizes for the City of Cork in 1822; and the prisoner having been arraigned, and pleaded not guilty, it was proved that a pension had been granted to *Jeremiah Healy*, and a pension bill issued from the Paymaster's Office to the Post-office at Cork, directed to *Jeremiah Healy;* that the prisoner had applied for it to the Post-master, representing himself to be *Jeremiah Healy*, who was proved to be dead at the time of the application. The Post-master, at the time of the application, was aware that *Healy* was dead, and that a person intended to apply for the pension in his name; and therefore, when the prisoner had made

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his application, and had answered the necessary questions, he had him arrested.

The prisoner was found guilty, and the learned Serjeant, at the request of the counsel for the Crown (the prisoner being undefended), reserved for the consideration of the Judges the question, "whether, inasmuch as the pensioner "*Jeremiah Healy* was dead when the prisoner applied for "the pension bill under his name, he was guilty of per- "sonating a person within the meaning of the act of "parliament of 46 G. 3, c. 69, s. 8."

It was unanimously held by the eight Judges who were present (*absentibus* O'GRADY, C. B., SMITH, B., and VANDELEUR and JOHNSON, J. J.), that upon the form of this indictment, all the counts of which represented *Healy* to be alive, the conviction was bad; but they expressed a strong opinion, that a good indictment might be framed under the statute, in a case where a deceased man was personated (*a*), and *that* although the party personated was known to be dead at the time of the application, by the person applied to by the prisoner.

(*a*) See *Rex* v. *Fitzmaurice, post.*

THE KING *v.* BEARD.

June 28, 1822.

A person finding a draft upon a banker, and tendering it for payment with the intention of converting the proceeds to his own use, knowing at the time that he is not the person entitled to receive the amount, is guilty of felony.

"*Draft* and *order* for payment of money" is a sufficient description within the meaning of a statute which makes the stealing of a *warrant* for payment of money, felony.

In this case the following Report was sent by Sir *Jonas Greene*, Recorder of Dublin, to the Judges.

"Upon the 26th of April, 1822, *John Beard* was convicted before me as Recorder, and Messrs. *Trevor* and *Nugent*, Aldermen, upon an indictment charging him with having feloniously stolen a draft and order for the payment of £100, concluding against the Statute; and the question shortly is, whether, under the circumstances which appeared in evidence, and as hereafter detailed, the offence of the prisoner amounted to a felony.

"*Robert King* swore that he was a student of Trinity College, that he had received from his mother, for the purpose of collection, a draft for £100 upon *Finlay's* bank, drawn payable to himself or bearer; that on the morning of the 17th of April then instant, he left the college with the draft, and in order to receive the amount of it; that he had the draft in one of the pockets of his pantaloons; that there was another paper in the same pocket loose and detached from the draft: that the pocket was buttoned; that on leaving the College there was some crowd before the College railing, through which crowd he passed; that in his way to the bank he missed the draft, the pocket however continuing buttoned, and the other paper remaining in the pocket; that he could not say he felt any hand at, or pressure upon, or towards the pocket. That on missing the draft he went immediately to the bank, and gave directions that if presented for payment it should be stopped.

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"*Robert Law*, one of the Firm of the Banking House of *Finlay* and Company, swore to the facts of Mr. *King* calling at the bank, and giving the directions above-mentioned: he further stated, that in a very few minutes after Mr. *King's* call at the bank, the prisoner appeared there, and presented to him, (witness) the draft for payment; that after looking at it, he asked the prisoner whom he got it from, and the prisoner's answer was, from Mr. *King;* that on witness's making some remark as to the falsity of this statement, the prisoner then said he had received it from a gentleman at the post office whom he did not know, who desired that he, the prisoner, would receive the amount of the draft for him, and that he would give prisoner a compensation for his trouble. The draft was duly identified. The prisoner called no witnesses.

"In my charge to the jury I directed them in the first place to consider whether the draft was *stolen* from Mr. *King*, and I added, that if such was their conclusion upon the evidence, the case would be the common and familiar one of stolen property found instantly after the fact upon the prisoner, and unaccounted for; and that with respect to the law in such a view of the transaction, there could be no difficulty. But if they should come to a different result upon the evidence, and be of opinion that the draft was not stolen from, but dropped by, Mr. *King*, and that the prisoner acquired the original possession innocently; then I directed them to consider whether the prisoner, with a knowledge of the value of the draft, and that he was not justly authorised to receive the amount of it, conceived the intention of fraudulently converting it to his own use, and to effectuate such intention, tendered it at the bank for payment; and if they should come to such result, then

I directed them, upon the authority of some recently published cases, to find the prisoner guilty.

"The jury, after a short deliberation, found the prisoner guilty; and upon a very particular communication with them as to the grounds of their finding, they stated that their inferences upon the case were, that Mr. *King* had dropped the draft, and that it was not stolen from him; that the prisoner afterwards found it, (thus negativing his allegation that he had received it from another,) but that fully apprised of the value of the draft, and that he was not the person who in justice should receive its amount, he determined fraudulently to convert it to his own use, and for that purpose, and to accomplish such his intent, made the tender of it for payment, as proved by Mr. *Law*.

"The recently published cases to which I alluded, are to be found in Russell's Crown Law, 2 vol., pages 1044—5, and as they are short, I take leave here to transcribe the passage:—'The doctrine as to a felonious taking of goods 'which have been found by the party, was further confirmed 'in two more recent cases; in the first of these cases it 'appeared that a pocket-book containing bank notes had 'been found by the prisoner in the highway, and afterwards 'converted by him to his own use; upon which *Lawrence*, 'J., observed, that if the party finding property in such 'manner knows the owner of it, or if there be any mark 'upon it by which the owner can be ascertained, and the 'party, instead of restoring the property, converts it to his 'own use, such conversion will constitute a felonious 'taking. And in the subsequent case the two prisoners '(father and son,) were convicted of stealing a bill of 'exchange, upon evidence of their having found and con-

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'verted it to their own use, by *endeavouring to negociate* '*it*. *Gibbs*, J., stated to the jury that it was the duty of 'every man who found the property of another, to use all 'diligence to find the owner, and not to *conceal the* '*property, (which was actually stealing it,)* and appro- 'priate it to his own use.' I apprehend the case herein respectfully submitted to the Judges is not on principle to be distinguished from those cases in Russell, and that it is quite a parallel case to that before *Gibbs*, J. Under an impression that the doctrine of *constructive* felony had been carried quite far enough and ought not to be extended, except upon the authority of solemnly considered and adjudged cases, I certainly feel a difficulty, notwithstanding the cases in *Russell*, in determining that the facts in the prisoner's case *did* constitute a felony, for I was not aware of any case prior to those alluded to explicitly deciding that a conversion of property, even with a fraudulent intent, when the original possession was purely and *bonâ fide* by *finding* constituted a felony. As to the case before *Lawrence*, J., it does not appear that there was a conviction; and in neither instance does it appear that there was a reference to the Judges.

"Lord *Hale*, in his Pleas of the Crown, vol. 1, page 506, lays down the law thus: 'If *A.* finds the purse of *B.* 'in the Highway, and takes it and carries it away, and 'hath all the circumstances that may prove it to be done '*animo furandi*, as *denying it, or secreting it*, yet it is no 'felony.' Lord *Coke*, in his 3rd Institute, page 108, says, 'if one lose his goods, and another find them, though he 'convert them *animo furandi*, to his own use, yet it is no 'larceny, *for the first taking is lawful.*' *Leigh's* case, to be found in 2nd East's Crown Law, p. 694, and in 2nd Russell,

page 1090, which was decided by all the Judges, (with the exception of one absent) may be considered highly material. The prisoner there was found by the jury to have had an original innocent possession (having with an honest purpose saved some articles from a fire in the house of a neighbour), but afterwards to have conceived the resolution of appropriating them fraudulently to her own use, and with that view to have *secreted* them and *denied* the possession of them. They found the prisoner guilty; but the judges were of opinion that there was no felony, *the original taking not having been with an intent to steal.* Some other cases possibly bearing upon the question are those respecting coachmen finding articles in their carriages, after setting down their fares, most of which appear to be collected in *Rex* v. *Wynne*, 1 Leach, 413, and among them *Lamb's* case, in 1694, (very shortly and unsatisfactorily stated,) and which would seem to make the conversion a felony, on the ground that the proprietor of the goods was traceable, to the knowledge of the prisoner; an observation applicable undoubtedly to the case under discussion.

"As larceny includes a trespass, and therefore a taking from the possession, I presume the principle of the decisions by *Lawrence* and *Gibbs*, J.J., was that the legal possession continued unaltered in the owner, and that the fact of fraudulently converting or attempting to convert the property to the prisoner's own use was *a taking;* indeed *Gibbs*, J., is made to say, that the concealment is stealing, a position, however, which does not appear to be recognised (but the contrary) by the Judges in *Leigh's* case, which I have taken the freedom of alluding to.

"I think it proper to remark, that since the trial it occurred

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to me that there was a misdescription of the instrument in the indictment, in being called a *draft* and *order* for payment of money; and on a reference to the statute which makes the stealing of choses in action felony(*a*), I find that the words *draft* or *order* do not occur in it, and that the designation of the instrument should be '*Warrant* for payment of money or bill of exchange.'"

It was held by all the eight Judges present, (viz. BUSHE, C. J., SMITH, B., M'CLELLAND, B., MOORE, J., JOHNSON, J., JEBB, J., BURTON, J., and PENNEFATHER, B.) who delivered their opinions *seriatim*, that the facts constituted a felonious taking, and that the conviction was right. The decision of the judges was founded on the authority of the cases then lately decided, in 2 Russ. Cr. Law, 1044-5; and most of the Judges considered those cases as not perfectly reconcileable with the principles laid down by *Coke* and *Hale*.

(*a*) 3 G. 2, c. 4, s. 3 (now repealed. The 9 G. 4, c. 55, s. 5, contains the words "order, or other security").

THE KING *v.* GIBNEY.

November. 1822.

Confession admissible, although apparently induced by the acts of the parties who conducted the prisoner to gaol; those acts being calculated to excite, not fear of temporal punishment, but horror at the recollection of the crime.

THE prisoner was indicted for the murder of *Margaret Gibney*, an infant of the age of nine months, by throwing her into a bog-hole, whereby she was suffocated and drowned; and was tried before *Johnson*, J., at the summer assizes at *Cavan*, in 1822, and the case rested upon a confession made by the prisoner under the circumstances detailed in the following statement of the evidence. The learned Judge received the confession in evidence, but reserved a question as to its admissibility, for the opinion of the Judges. The prisoner's wife had been indicted jointly with him, but was acquitted.

A child, supposed to be the child in question, had been found drowned in a bog-hole, and at the time stated in the testimony of the witness by whom it was sought to give the confession in evidence, was lying in a field adjoining the high road, with a crowd of people about it.

Thomas Lennon stated that he was a constable; remembered the time the child was found; knew the prisoner, and identified him; saw him on the 24th of May; went to take him; found him in custody with Mr. *Young*, the magistrate, before whom he had been brought; he was then given in custody to witness; witness was bringing him to the gaol, and passed near where the body lay. Being asked the usual questions previous to giving a confession in evidence, he said he held out no hope to the prisoner, nor used any threat to induce him to confess. The prisoner first denied knowing any thing of the matter,

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and did so before the magistrate. On their way to the gaol they came by the field adjoining the road where the body was lying. The road and field were full of people; all knew what the prisoner was charged with; the people desired witness to bring the prisoner where the body was lying, that he might touch it; witness had heard of a superstitious notion prevailing among country people, as to the effect of a murderer touching the body of the person murdered. After the prisoner had come to the body, and before he said any thing, a man of the name of *Kenny*, son to the person with whom the prisoner had lived as a servant, took him aside, and held some conversation with him; what it was the witness did not know. (This man was not produced.) Another constable, who was with witness, also spoke to the prisoner on the way, before they came to the place where the child was; witness did not hear him hold out any hope or use any threat to the prisoner, but could not say he heard all he said to him. One object of bringing the prisoner to the dead body was, that he might see whether the body was the body of his child or not. The body was 200 or 300 yards from the road. The prisoner said nothing to witness while he was in the field; he was brought to the body and touched it; the people were about him, and talking on the subject of the murder. After he had brought away the prisoner, and had proceeded about a quarter of a mile towards the gaol, witness said to him, "You must be a very unhappy boy to "have murdered your own child, if it be the case." The prisoner was crying very severely. Witness then said, "Did you kill the child?" The prisoner then said he had done so, about a fortnight before *May-day;* that he had applied to his mother to rear the child, and she had refused him, and that he had applied to his master for

money, but he had also refused him, and that he had no money or means to provide for it; that he had tied up the child and put it in a hole in the bog; that he had remained out long enough to make people think he had time to go to his mother's with the child.

On his cross-examination the witness said there was much conversation among the people in the hearing of the prisoner about the murder; the only time the prisoner was at a distance from witness was whilst he was talking with *Kenny*. The prisoner did not make a confession until after he had seen his wife, in the place where the body lay, and the body. The prisoner had been before the magistrate before witness received him under a committal. Witness heard the people on the road say, that the prisoner was charged with the murder of his own child, and that he ought to be hanged, if guilty; this was in the hearing of prisoner, and before any confession. When they came into the field, the cry of the people was greater; this was calculated to affect the mind of the prisoner. He cried bitterly from the time witness got him into custody. When witness asked him did he kill his child, he did not tell him he would give what he said in evidence, and he did not suppose the prisoner thought he would. He said he was willing to die, and hoped God would have mercy on him. Dr. *Fitzpatrick*, who was present, was anxious that the prisoner should touch the body; witness had heard an opinion that if the murderer touches the body of the person he has killed, the nose of the deceased person will bleed. Witness thought the other constable spoke to the prisoner first, as to whether he had killed the child. Witness had stopped a little, and when he came up, the prisoner and

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the other constable appeared in conversation, and the witness asked the prisoner if he had killed the child.

The next witness, *Arthur Foster*, stated that he was a constable; that he held out no threat or promise to him before or after they came to the field; the prisoner was brought to the body in the hope that his conscience might strike him; soon after leaving the field witness said to the prisoner, "Was he not a terrible man to do such a thing?" Before this the prisoner had a conversation with another man, which witness did not hear. The other witness and the prisoner conversed about the child, and upon both the witnesses again expressing themselves on the subject of its death, the prisoner said his conscience would not let him conceal it any longer, and he then confessed. Neither he nor the last witness held out any threat or hope to him.

On his cross-examination, he said that he and the prisoner had some conversation before they came to the field; witness and the other constable several times told him what a terrible offence he had committed; that it was a terrible thing for a man to murder his own child; witness meant nothing by what he said but to make the prisoner tell the truth. The prisoner always denied the charge until after they had been in the field. Witness did not tell the prisoner the consequence of the confession; believed he was not aware it would be given in evidence on the trial.

The question arising upon the foregoing evidence was, whether the confession in this case did not result from the circumstance of the prisoner's mind being excited to terror

by the acts and speeches of the persons through whom, and by whom, the prisoner was conducted to gaol; and, therefore, whether it was such a voluntary confession as ought to be given in evidence against the prisoner.

ALL THE JUDGES being present, it was their unanimous opinion that the confession was properly received in evidence. Some of the Judges at first had doubts, but they finally concurred with the rest. They held the rule to be well established, that a voluntary confession shall be received in evidence, but if hope has been excited, or threats, or intimidation held out, it shall not. The fear, however, to be produced, must be of a temporal nature, and in this case there was no such threat or intimidation, nor any fear of a temporal nature produced; any terror that might have been excited was as to what might happen in the next world.

On account of the extraordinary circumstances of the case, the prisoner was recommended to mercy; and he was not executed.

November, 1822.

In the Matter of a PRESENTMENT by the GRAND JURY of the County of DOWN.

Where a presentment was made, without being traversed, of a certain sum to be paid by instalments; and at the next assizes a presentment was made of one of these instalments; *Held*, that a traverse did not lie to the latter presentment.

At the Summer Assizes for the County of *Down*, in 1822, *Jebb*, J. reserved for the consideration of the Judges a question whether a traverse of a presentment for £2000, tendered at those Assizes, lay, under the following circumstances.

At the Spring Assizes in 1821, the Grand Jury presented the sum of £60,000 to be raised off the County at large, for the purpose of building a new County Gaol, and by the said presentment directed that the sum should be raised by half-yearly instalments of £2,000 each, and they presented the first half-yearly instalment. They also appointed twelve commissioners to carry the presentment into effect, pursuant to the 50 Geo. III. c. 103(*a*). The commissioners approved of a plan and estimate, fixed on a site for the new gaol, and had the ground valued by a jury, but did not take a conveyance of the ground, nor enter into possession of it, nor commence nor contract for the building. In these preliminary acts they incurred an expense of £3,000. The plan and estimate were subsequently approved of by the Lord Lieutenant, but no *contract* was laid before him, nor entered into by the commissioners. At the Summer Assizes in 1821, and the Spring Assizes in 1822, presentments were passed for the half-yearly instalments of £2,000, and these with the first instalments were levied. At these two last Assizes it appeared, from certain

(*a*) The provisions of this Act have been adopted by the 7 G. 4. c. 74, which is still in force, subject to the additional provisions of the 6 & 7 W. 4. c. 116, s. 124.

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County Down PRESENTMENT.

other plans and estimates which had been procured, that the then present gaol might be sufficiently enlarged for the sum of £2,000, and it became a matter of discussion among the grand jury whether they should proceed upon the original expensive plan, or adopt the more economical one. The majority of the grand jury, at the Summer Assizes in 1822, were in favour of the former, and accordingly presented an instalment of £2,000. It was to this instalment that the traverse in question was tendered.

The Judges were unanimously of opinion that the traverse did not lie; on the ground that a traverse does not lie to the presentment of an instalment which is the mere execution of a previous presentment which might have been traversed(*a*.)

(*a*) The 6 & 7 W. 4. c. 116, s. 133, enacts, "that *presentments* shall be traversed only at the Assizes at which the presentments shall be made."

The KING *v.* BROWNE and Others.

Feb. 19, 1823.

An indictment for abduction stated in one count, that the prisoners, on &c., at &c., upon one H. G. then and there being, did make an assault, and her the said H. G. did carry away.

The first count of the indictment charged that the prisoners, "being evil-disposed persons, and not regarding the "laws and statutes of this realm, on the 10th day of "March, in the 3d year of the King, with force and arms, at "*Glengurt*, in the County of *Limerick*, in and upon one "*Honora Goolde*, in the peace of God and of our Lord the

Another count stated, in the same terms, an assault and abduction by persons unknown, and that the prisoners were then and there present, aiding and abetting. *Held* by eight Judges against three, that the indictment was bad for want of a venue.

It is no valid objection that such an indictment concludes against the form of the "statute," instead of "statutes."

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" King then and there being, did feloniously make an " assault, and her the said *Honora Goolde* did feloniously " and by force take and carry away against her consent, " with intent that the said *John Browne* should feloniously " marry her the said *Honora Goolde*, against the peace, &c. " and against the statute in such case made and provided." The second count varied only in substituting the word " defile" for " marry." The third count charged " that " certain persons unknown, on &c., with force and arms, at " *Glengurt*, in the County of *Limerick* aforesaid, in and " upon the said *Honora Goolde*, in the peace of God and " our said Lord the King then and there being, did felo- " niously make an assault, and her the said *Honora Goolde* " did feloniously and by force take and carry away against " her consent, with intent that the said *John Browne* should " feloniously marry her; and that the said (prisoners) were " and each of them was then and there feloniously present, " aiding and abetting, &c., the said unknown persons in " the felony aforesaid, against the peace, &c., and against " the statute in such case made and provided." The fourth count differed from the third, as the second did from the first; and it also omitted the words, " then and there," before " feloniously present."

At the trial before *Torrens*, Serjeant, at the Summer Assizes for the County of *Limerick*, in 1822, the prisoners were convicted; and when they were brought up to receive sentence, it was moved by their counsel in arrest of judgment: First, that there was no venue laid as to where the offence of the *abduction* was committed; the venue laid and the words " then and there" being applicable only to the felonious assault. Secondly, that the indictment concluded " against the form of the *statute*," whereas it ought to have

concluded "against the form of the *statutes*." The learned Serjeant having reserved these questions, ten of the Judges met (Lord *Norbury*, C. J. C. Pleas, and *Smith*, B., being absent). EIGHT JUDGES (*Bushe*, C. J., *O'Grady*, C. B., *M'Clelland*, B., *Fletcher*, J., *Moore*, J., *Jebb*, J., *Burton*, J., and *Vandeleur*, J.,) held that the indictment was bad, for want of a venue to the averment of the abduction; and that the authorities, *Dyer*, 69 a, and 2 *Hale*, 180, were in point. *Johnson*, J. and *Pennefather*, B., thought that the third count was good on this ground; that it stated that the prisoners were "then and there" present, aiding and assisting, &c.; that these words were words of reference to something that went before, and the only time and place mentioned before being those which preceded the assault, these words referred to the venue of the assault; and that if this were so, then, inasmuch as it was averred that they were then and there aiding and assisting in the felony, it followed that the felony was then and there committed

But to this it was answered by the other Judges, and resolved, that the authorities cited established, that the felony being laid without a venue is not to be intended to be committed at the time and place at which the assault was committed, but may have been committed at another time and place; that "then and there" when prefixed to the averment of the felonious abduction, are words of reference to the time and place of the abduction, and not to the time and place of the assault; and that it is not necessary that the time and place should be defined in order to constitute them words of reference, but that they may refer to an undefined time and place.

Upon the other point, all present were unanimous in

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holding that there was no valid objection on account of the word "statute" being in the singular number(*a*).

(*a*) The indictment was founded on the 19 Geo. II. c. 13, s. 2, which is in the following terms:—"Be it further enacted, &c. That if any maid or "woman be taken or carried away by force against her consent, with "an intent to marry or defile such maid or woman *contrary to the true* "*intent and meaning of the said in part recited Act* (6 Ann. c. 16), every "such person so taking and carrying away by force and against the con- "sent of such maid or woman, any maid or woman with intent to marry "or defile her, and the aiders and procurers of such forcible taking and "carrying away such maid or woman, and all as well principals as accessa- "ries before such fact committed, shall be deemed and adjudged to be "felons, and shall suffer pain of death without benefit of clergy or statute," &c. (The 10 Geo. IV. c. 34, s. 22, in the corresponding enactment at present in force.)

May 7, 9, 1823.

THE KING *v.* HOULTON and others.

The prosecutor's wife is a competent witness for the defence.

It is no objection to the testimony of a wife, that she is brought to contradict the testimony of her husband.

THE prisoner was convicted of an assault and riot at the sessions of *Moate*, before *James Lyne*, Esq. Assistant Barrister and Chairman for the county of *Westmeath*. A letter was received by *Bushe*, C.J., from Mr. *Gregory*, the Under Secretary of State, conveying the desire of the Lord Lieutenant, that he should take the opinion of all the Judges, whether the conviction was legal and proper, and whether certain evidence had been properly rejected by the court; and in case it had not, what the Judges would recommend to be done. There were two indictments: one for unlawfully entering the house of one *Thomas Moffatt*, and assaulting him, and his wife, *Jane Moffatt*; and the other indictment for a riot. The prisoner was a Roman Catholic priest; it appeared on the trial that the woman, *Jane Moffatt*, being dangerously ill, had received the sacrament from the Protestant clergy-

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man of the parish, and that both she and her husband were Protestants; that on the following day the prisoner, the Roman Catholic parish priest, came to *Moffatt's* house, and insisted on administering to the woman the rights of the Roman Catholic church, and that he was resisted by *Moffatt;* that the woman was taken out of bed in consequence of the priest's desire, and carried to an adjoining house, where she was anointed by the priest. The defence was, that the priest had been sent for by the woman or her daughters, and that she was brought out of the house, by her own desire. Witnesses were examined on both sides, the indictments were fully supported, and the outrage being very great, the prisoner was sentenced to pay a fine of £40, and to be imprisoned twelve months. *Jane Moffatt*, the wife, had been tendered as a witness on behalf of the prisoner, and rejected; the learned Chairman advising the bench, that in his opinion she was incompetent not only on the ground of identity of interest, but on that of public policy, which would not allow husband or wife to be examined, where the testimony of one might even tend to criminate the other. A memorial was presented to the Lord Lieutenant by the prisoner, complaining of injustice in the trial, and particularly in the rejection of the wife as a witness. This memorial, together with the report of the trial by the Assistant Barrister, were laid before the Judges.

It was the unanimous opinion of ELEVEN JUDGES present (*Fletcher*, J. being absent), that the testimony of the wife, *Jane Moffatt*, ought to have been received. They held, that it is no objection to the evidence of a wife that she is brought to contradict the evidence of her husband, and that it would be most injurious to public justice if

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such a principle were established; that it is the constant practice on criminal trials, where husband and wife have been present at the commission of the crime, to produce the wife as well as the husband in support of the prosecution; and that if she could not be examined for the prisoner, neither ought she against him. That in the case of the *King* v. *the Inhabitants of Cliviger*(*a*), which it was supposed might have influenced the decision of the barrister, the doctrine laid down by the Judges (*Ashurst* and *Grose*), is disapproved of by the Court in the case of the *King* v. *the Inhabitants of All Saints, Worcester* (*b*). It appeared at first to one of the Judges, (*O'Grady*, C. B.) that there was an objection to the testimony on the ground that the wife shall not be examined against the interest of her husband, and that the husband had an interest in the event of the prosecution, on account of the 54 Geo. III. c. 181(*c*), which enables the Court to award a sum of money on conviction of the assault to the prosecutor, as compensation for loss of time, &c.; but the other Judges held, that this was not such an interest in the husband, as should prevent the reception of the evidence, even if the 6th section of the statute had not declared him to be competent, for that prosecutors entitled to a reward for prosecution, or to restitution of stolen goods, never are rejected on the ground of interest. But this objection was completely removed by the circumstances of the prisoner being charged with an assault on the wife as well as the husband, and of there being a second indictment for a riot.

The answer of the Judges was returned by BUSHE, C.J.,

(*a*) 2 T. R. 263.

(*b*) 1 Phill. Ev. 82; 2 Stark. Ev. 401 (edn. 1833).

(*c*) The 10 G. 4, c. 34, s. 33, is the corresponding enactment now in force.

to this effect, that the Judges were unanimously of opinion that the conviction of the prisoner was illegal on the single ground, that the evidence of *Jane Moffatt* ought not to have been rejected; and that as it was impossible to say whether, if she had been examined, the prisoner might not have been acquitted upon one or more of the charges, or if found guilty, whether the sentence might not have been different from what it was, they were of opinion he ought to receive a free pardon.

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The prisoner, together with others convicted on the same indictment, was accordingly pardoned.

IN the Matter of a PRESENTMENT by the Grand Jury of the County of DONEGAL.

November. 1823.

THE following case was reserved for the opinion of the Judges by *Johnson*, J. The statute 54 Geo. III. c. 131(*a*), entitled, "an Act for the better execution of "the law in Ireland," enacts, (s. 1.) that the Lord Lieutenant may proclaim disturbed districts, and appoint one chief magistrate of police therein, and (by sec. 6.) a clerk in aid of such chief magistrate. The 11th section directs, that the salaries, charges, and expenses therein particularly enumerated, shall be borne and defrayed by presentment; that the grand jury shall, at each assizes, present all such of the salaries, &c., as were not theretofore presented, the same being duly vouched by affidavit, and it being testified by such chief magistrate that the constables respectively have faithfully and actively discharged their duties.—(The case also re-

An affidavit upon "knowledge and belief," under s. 11 of the Peace Preservation Act (54 Geo. 3. c. 131), made by the chief magistrate alone, is insufficient.

(*a*) This act is still in force, and is expressly referred to by the 6 & 7 W. 4, c. 116, s. 101.

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ferred to the statute 55 Geo. III. c. 13, and 57 Geo. III. c. 22, which however, did not appear to bear on the question referred to the Judges). At the last assizes for the county of *Donegal*, an account of all expenses incurred under said Acts for the barony of *Innishowen* for seventeen months, from 2nd February, 1822, to 30th June, 1823, inclusive, was laid before the grand jury, amounting to £3,324 2*s.* 4*d.* one-third of which is £1,108 0*s.* 9*d.* and a like account of the barony of Raphoe, in said county, for the same period, amounting to the sum of £3,345, one-third of which is £1,115.

The proper certificate as to the conduct of the constables, signed by the chief magistrate, was annexed to each account respectively. The verifying affidavit was made by the chief magistrate, and not by the clerk, in the following words: "*William Webb*, Esq. Chief Magis- "trate, maketh oath and saith, to the best of his know- "ledge and belief, that the annexed account contains a "just and true statement of the salaries, allowances, pay- "ments, rents, taxes, costs, charges, and expenses, which "have been paid and incurred, for the maintenance and "support of the said police establishment in the barony "of *Raphoe*, in the county of *Donegal*, for seventeen "months, commencing 1st February, 1822, and ending "30th June, 1823, inclusive." There was a similar affidavit for the barony of *Innishowen*. The learned Judge did not think the affidavit sufficient within the provisions of the 54 Geo. III. c. 131, and suspended fiating the presentments.

All the Twelve Judges were of opinion that the affidavit was insufficient.

THE KING *v.* THOMAS FITZMAURICE. *Feb.* 16, 1824.

To personate a *deceased* disabled soldier was an offence within the 46 G. III. c. 69, s. 8. The word "person" applies to the dead as well as to the living. *Semble*, that an averment that a man had served in a regiment "of our Lord the King," is not supported by evidence that he had served in the reign of the *late* King.

At the Summer Assizes, held at *Philipstown*, in 1823, the prisoner was tried before *O'Grady*, C. B., on an indictment grounded on the statute 46 Geo. III. c. 69, s. 8.(*a*), for personating *Martin Kennedy*, a discharged soldier, entitled to a pension. The first count stated, that on the 16th day of March, 1815, one *Martin Kennedy* was entitled as an invalid, disabled, and discharged soldier of our Lord the King, to a certain pension, relief, or allowance, to wit, &c., under and by virtue of an Act of the 46th Geo. III.; that afterwards, to wit, on the 14th of November, 1816, at, &c., the said *Martin Kennedy* died; that one *Thomas Fitzmaurice*, (the prisoner,) well knowing the premises, on the 30th of September, in the 3d year of George the Fourth, at, &c., with force and arms, &c. did willingly, knowingly, and feloniously, personate and falsely and feloniously assume the name and character of another person, to wit, of the said late *Martin Kennedy*, deceased, then and there supposed to be a person entitled to said pension, relief and allowance; and that the said *Thomas Fitzmaurice* did then and there so personate, &c., in order to receive part of the said pension, &c., to which the said *Martin Kennedy* was supposed to be entitled, to wit, the sum of £4 18*s.* 7*d.*, being the amount of the said pension for 91 days, from the 25th of *September* to the 24th of December, 1822. The second count stated, that the prisoner on the 30th of September, in the 3d year of Geo. IV., at &c., did personate another person, to wit, one *Martin*

(*a*) This Act is now no longer in force; but similar provisions are contained in the 7 G. 4. c. 16, s. 38, and the 2 W. 4. c. 53, s. 49.

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Kennedy, supposed to be entitled, as an invalid, disabled, and discharged soldier of our said Lord the King, to a certain pension, to wit, &c., under the 46 Geo. III.; and that the prisoner did so personate in order to receive part of the said pension, to wit, &c. The third count differed from the first, in omitting the averment of *Martin Kennedy's* death in 1816, and introducing an averment, "that on the "30th of September, 1822, the said *Martin Kennedy* was "entitled to the said pension." The fourth count charged, that the prisoner personated one *Martin Kennedy*, supposed to be entitled by his services (omitting venue,) in the 7th Dragoon Guards of our Lord the King, and as an invalid, disabled and discharged soldier, to a certain pension, in order to receive the same.

It appeared in evidence, that *Martin Kennedy*, the disabled and discharged soldier whom the prisoner personated, died in 1816; and the money was paid to the prisoner in ignorance of that fact, and upon the supposition of his being that soldier. The counsel for the prisoner insisted that the word "person" in the statute, even when followed by the words, "supposed to be entitled," did not extend to the case of a deceased man, and the learned *Chief Baron* was of that opinion; but he sent the facts to the jury, and a verdict of *guilty* having been returned, his Lordship, at the desire of the counsel on both sides, reserved the question for the opinion of the twelve Judges.

Three of the Judges (*O'Grady*, C. B., *Vandeleur*, J., and *Torrens*, J.,) were of opinion that all the counts in the indictment were bad. They considered the averment in the first count, that *Kennedy* was supposed to be entitled as an invalid soldier, &c., repugnant to the previous alle-

gation, that he had died in 1816; and as to this count all the Judges agreed with them. The third count they, and all the Judges, agreed, was not supported by the evidence, *Kennedy* being dead. The fourth count, the three Judges held not to be supported by the evidence, *Kennedy's* services having been in a regiment of our *late* Lord the King; and there being no venue to this averment; and the general opinion of the other Judges seemed to be the same, but it was unnecessary to decide this point, as those other Judges were of opinion that the second count was good. The three Judges held that the second count was bad, as, even supposing *Kennedy* to be alive, he never was an invalid soldier of our Lord the *now* King, having been discharged in the time of the late King.

But the other Nine Judges (*Bushe*, C. J., Lord *Norbury*, C. J. C. Pleas, *Smith*, B., *M'Clelland*, B., *Moore*, J., *Johnson*, J., *Jebb*, J., *Burton*, J., and *Pennefather*, B.,) held that the second count was supported by the evidence, for they held that if *Kennedy* were alive, "invalid, disabled "and discharged soldier" would be his proper description, and that this meant a soldier of our Lord the now King. With respect to the facts proved, four Judges (*O'Grady*, C. B., *Moore*, J., *Johnson*, J. and *Pennefather*, B.,) held that they did not constitute a crime within the statute; and that "person" meant a "living person." Eight Judges (*Bushe*, C. J., Lord *Norbury*, C. J. C. Pleas, *Smith*, B., *M'Clelland*, B., *Jebb*, J., *Burton*, J., *Vandeleur*, J., and *Torrens*, J.,) held that the case of personating a deceased soldier was within the statute. That the Greenwich Act, 54 Geo. III. c. 93, must receive the same construction as the Act in question, and by it the cases of personating a *living* seaman, and the representatives of a deceased one,

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are both provided for; and to say that the case of a deceased seaman was omitted would be to suppose that the legislature left unprovided for, a fraud very likely to be practised, and which, in fact, is much more frequently practised than the fraud of personating a living man. That the term, "person," is applied in common speech to the dead as well as the living, and in construing an Act of Parliament words are to be used in their ordinary signification.

The result was, that although there was a majority in favour of the conviction on each point, yet as there was such a diversity of opinion, and as they were equally divided on the whole, it was agreed that the prisoner should be recommended.

The CHIEF JUSTICE, with the concurrence of the Judges, wrote to *Abbott*, C. J., requesting to be informed whether any such cases had occurred in England, and if there had, how they had been ruled? *Abbott*, C. J., answered this letter, saying that he was not aware of any decision upon this statute, 46 Geo. III. c. 69, but that two cases (*Rex* v. *Martin* and *Rex* v. *Cramp*,) had been decided by the twelve Judges on a similar statute, the Greenwich Act, 54 Geo. III. c. 93, s. 89; and his Lordship transmitted copies of those two cases(*a*), in which convictions under similar circumstances were held good.

(*a*) They have been since reported in Russ. and Ry. 324, 327.

IN the Matter of CRIERS' FEES.

Jan. 26, 1824.

THE following case was submitted by *Torrens*, J., for the consideration of the Judges:

Clerks of the crown and criers are not prohibited by statute from taking any fees, except those which had been formerly paid by presentment, and are now commuted for salary.

Schedule of fees to which the crier is entitled.

"By the Act of the 4th Geo. IV. c. 43(*a*) entitled, 'An Act 'to regulate the amount of presentments by grand juries, for 'the payment of public officers of the several counties in Ire- 'land,' it is by the first section(*b*) enacted, 'That all the 'Clerks of the Crown, Clerks of the Peace, Secretaries to 'Grand Juries, Sheriffs, Medical Officers of Prisons, and 'all other officers specified in the table to the said Act 'annexed, for the payment or remuneration of whose 'duties, salaries, or expenses, any presentment is required 'to be made by Grand Juries under any Acts in force at 'the time of the passing of said Act, shall from thence- 'forth be paid and remunerated for all such duties, 'services, and expenses, by annual salaries only, payable 'half-yearly, according to the table to said Act annexed; 'and such sums, so presented, not exceeding the annual 'sum set forth in the said table, shall be in full and 'complete satisfaction and remuneration for all duties and 'services to be done and performed, and for all expenses 'to be incurred by such officers, for which any present- 'ment may lawfully be made by any Grand Jury.' The persons who have heretofore acted as criers in the re-

(*a*) Although the provisions of this Act have been superseded by the 6 & 7 W. 4, c. 116, yet the principle established by this case applies equally well to the latter Act; and this case was referred to by the Judges in 1837 and 1839, as the basis of their decisions in those years, in the cases of the *Fermanagh* and *Clare* Road Traverses (*vide post*). The schedule of fees, as settled on this occasion, remains unaltered, except that the *traverse* mentioned in the first item, means only a traverse *for damages*.

(*b*) *Vide* s. 110, of 6 & 7 W. 4, c. 116.

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spective courts on the circuit, are not mentioned by name in the foregoing section; but in the table of classification of counties and salaries of public officers annexed to this Act, such persons are denominated "Judges' Criers." This Act only received the royal assent immediately previous to the last summer circuit (viz. on the 27th of June, 1823), and a difference of construction having been given to it on the different circuits by the respective Judges, it appears desirable that your Lordships' opinion should be had on the proper construction and regulations to be now adopted with respect to those officers, so that an uniformity of construction may hereafter prevail. The following points are therefore submitted to your Lordships' consideration: 1st, Whether any other fee or gratuity whatsoever is now of right payable to, or demandable by, the Judges' Criers, save the salaries specified in the table of classification? The fees and gratuities hitherto paid, as far as they have come under my observation, consist, first, of fees payable to the crier in the civil court, upon trials of records and verdicts returned, and (I believe) appeals from assistant barristers' and manor courts; secondly, gratuities paid by the sheriffs, to induce the Judges' servants to act as criers; thirdly, fees on burning petitions in the crown court. There may be others which your Lordships' experience may suggest.

"2ndly. Whether the respective criers of each Judge be not entitled, under the words "Judges' Criers," to a half-yearly salary, under the table of classification? It is apprehended that the arrangement of the Judges on the circuit presiding at the same time in different courts, was so settled by themselves for their own and the public convenience, and is not regulated by any legislative enact-

ment, and it may, and frequently does happen, that the Judge, whose turn it is to preside in the civil court, is called upon to assist his colleague in delivering the gaol, taking presentments, &c. &c.

" 3rdly. Whether it was not the intention of the legislature, and would not be now desirable (if the statute referred to will bear the construction suggested), that the Judges' Criers (now so called for the first time), should be put on the same footing with all other public officers, and be paid the specified salary only; and that all fees, or gratuities in the nature of fees, should be prohibited from being taken by them?

" 4thly. Whether, since the 4 Geo. IV., the sheriff be still bound to provide a crier for the court?"

THE JUDGES held, on a principle common to both clerks of the crown and criers, that the salaries provided by the 4 G. IV. c. 43, were only in lieu of fees formerly paid by presentment, and therefore did not bar a claim to any *lawful* fees of another description. With respect to the criers, they went further, and established a list of the fees which they might lawfully claim over and above their salaries(*a*). They also held, that certain other gratuities

(*a*) These are as follows: *In the crown court*—on the trial of *any traverse* to a grand jury presentment, 5*s*.

On the hearing of any petition for compensation for malicious injury, by burning or otherwise, 5*s*.

In the civil court—for each record tried by a special or common jury, 10*s*. 6*d*.

On each recognizance, or bail-piece, acknowledged before the judge, 5*s*.

On each affidavit sworn in court, 1*s*.

The first item in this list applies now only to the case of a traverse *for damages*, in consequence of s. 133 of 6 & 7 W. 4, c. 116. See the cases (*post*) of the *Fermanagh Road Traverse*, in 1837, and the *Clare Road Traverse*, in 1839.

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theretofore paid to the criers by certain persons were not demandable of right, but mere courtesies, which it was optional with the party to pay or not; such as money customarily given by barristers and attorneys to the crier of each court, in consequence of his attending to their accommodation therein, and a sum given by the sub-sheriff to the crier, for assisting him in preserving order in the courts.

May 12, 1824.

THE KING *v.* CAHILL and Others.

An indictment for burglary in a gate-house, stating it to be the *dwelling-house* of the *gate-keeper*, is bad.

An indictment under the Whiteboy Act for an injury to a gate-house, stating it to be the "dwelling-house and habitation" of the gate-keeper, is sufficient.

THE prisoners were convicted before *Bushe*, C. J., at the Spring Assizes for the County of *Kilkenny*, in 1824, upon two indictments. The first indictment was for burglary, viz. for "feloniously and burglariously breaking and entering the dwelling-house of one *William Spellan*, at eleven o'clock at night, with intent to kill the said *William Spellan*." The second indictment was under the Whiteboy Act(*a*), viz. that the prisoners, between sunset and sunrise, did "assault and injure the dwelling-house and habitation of *William Spellan*, by pulling the slates off the roof of the said dwelling-house and habitation." There was a second count in the latter indictment, omitting the words, "by pulling the slates off," &c.

Both indictments were sufficiently supported by the evidence; but it appeared that *William Spellan* was the gate-keeper and wood-ranger of Sir *Wheeler Cuffe*, and as such lived in his gate-house, which was on the side of the

(*a*) 15, 16 Geo. III. c. 21, s. 4.

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high road, and nearly half a mile from Sir *Wheeler's* house; that no one lived in the gate-house except *Spellan* and his family, and that Sir *Wheeler Cuffe* paid him for his services by wages of £10 a year, and by an allowance of firing and milk, and by permitting him to live in the gate-house, of which he had no lease, and for which he paid no rent. Under these circumstances, counsel for the prisoner insisted that the gate-house was not the *dwelling-house* of *Spellan*, so as to support the indictment. The learned Chief Justice reserved this question for the twelve Judges, and sent the case to the jury, who found the prisoners guilty.

TEN JUDGES (*absentibus Smith*, B. and *Johnson*, J.,) ruled that the indictment for *burglary* was not sustained, as for the purposes of burglary the house was the house of Sir *Wheeler Cuffe;* on the authority of the case of *Rex* v. *Moore*(*a*), and the authorities there cited. But they were also of opinion that the conviction on the second indictment was good. The words of the statute are, "if any person "shall maliciously assault or injure the *habitation*, pro- "perty, goods," &c.; which general word, "habitation,"

(*a*) REX *v.* LAURENCE MOORE.
October, 1820.

The prisoner was indicted at the October Sessions at Green-street, before *Daly*, J. and *Smith*, B., for burglary, on an indictment containing two counts. The first count laid the burglary in the dwelling-house of *George Prescott*, the second in the dwelling-house of *George Vesey*. The prisoner was acquitted on the first count, and found guilty on the second; but the Judges, doubting the propriety of the conviction, reserved the case for the opinion of the Judges. The house was an ornamental cottage in Mr. *Vesey's* demesne, to which Mr. *Vesey* and his family used to resort, and in which they occasionally dined, but never slept. *G. Prescott* was Mr. *Vesey's* servant, having the care of the cottage, and he and his family inhabited part of it, but paid no rent, and he was removable at Mr. *Vesey's* pleasure. Upon the authority of *Rex* v. *Stock and Edwards*, 2 Taunt. 339, and 2 Leach 1015, and on consideration of all the cases, the Judges held the conviction to be proper.

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shows that it was intended that any place in which any person inhabited was to be protected; and that the rule in arson, by which the offence is considered to be committed against the actual possessor, by whatever title he may hold the possession, is the rule which should govern cases under this statute. The indictment in this case had introduced the word "dwelling-house," which is not in the statute; but this did not affect the case, as the word "habitation" was also in it.

June 30. 1824.

THE KING *v* JAMES WALSH.

To negative handwriting, it is sufficient evidence if the supposed writer can state his positive knowledge, *from circumstances*, that the writing cannot be his, although he also states that he cannot, even upon his belief, on a mere inspection of the writing, say whether it is his or not.

THE prisoner was tried at the Spring Assizes for the City of *Waterford*, in 1824, before *Smith*, B., upon an indictment for obtaining money under false pretences. The pretences were stated to be, the tendering for payment certain paper writings, purporting to be tradesmen's bills for contract work done, with receipts at foot for the amount signed by the prisoner, and the whole countersigned by Alderman *Hackett*, one of the comptrollers of certain works in which the Corporation of *Waterford* had been engaged; the intent being to defraud the said Corporation. By the regulations of the Corporation, this counter-signature by Alderman *Hackett* was to be the Chamberlain's authority for paying over the money specified in the various bills.

Alderman *Hackett* being examined, stated that the several signatures were not his handwriting. On his cross-examination he stated, that if he wanted any thing to corroborate his opinion, the contents of one of the papers

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(which he specified,) would lead him to deny his signature; and his knowledge that the prisoner did not work in that year confirmed his opinion. That he certainly would not decide on the naked signature alone, especially as he had at that time, and at the time of his examination, the gout in his hand. He was here shown the naked signature to some documents. He would not swear that it was, or was not, his handwriting. These papers, when opened, proved to be the same to which his direct testimony had applied. An order for payment to one *M.* was now produced; witness believed this to be his handwriting, because he knew that *M.* had done the work. Witness was positive that the prisoner did not work in 1823 (the year in which the receipts purported to bear date). At a subsequent stage of the case, this witness was recalled, and examined by the Court; on this occasion he stated, that he could not, *even upon his belief,* on a mere inspection of the signature, without reference to the contents of the paper, say whether the signature was his handwriting or not, without looking at the contents; he could not take upon himself to believe one way or another.

The learned Baron reserved for the opinion of the twelve Judges, the question whether *Hackett* had given any legal evidence that the signatures were not his handwriting(*a*); but sent the case to the jury, who found the prisoner guilty.

(*a*) Two other questions were reserved on points with respect to which the statutes 9 G. 4. c. 55, s. 46, & 9 G. 4. c. 32, s. 2, have since removed all difficulty, viz. whether in this case the fraud was merged in a felony. The Judges held that it was not, as the documents in question were not orders for the payment of money under the statute upon that subject:— and secondly, whether Alderman *Hackett* was a competent witness; the Judges held that he was, inasmuch as he was not liable to be sued upon the documents in question.

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ELEVEN JUDGES (*absente Johnson*, J.,) were unanimously of opinion that the conviction was right, and that *Hackett's* evidence as to his handwriting was sufficient; his positive knowledge from circumstances that it was not his handwriting, being a higher degree of evidence than any belief formed from knowledge of handwriting, even by the writer himself.

Feb. 16, 1825. IN the Matter of JAMES DELANY'S Traverse of a Road on the Merits.

The passing of a presentment is *primâ facie* evidence of the legality of proceedings under the 59 G. 3, c. 84, on the part of a person who has obtained a road presentment.

THE following question was reserved by *Smith*, B., from the Maryborough Summer Assizes, in 1824:—"Whether, "on the trial of a traverse upon the merits of a road pre- "sentment, the person who has obtained the presentment "is bound to prove the several matters required by the "statute 59 Geo. III. c. 84, previous to the approbation "of the magistrates of such presentment at the special "sessions?"

Subject to the above, both parties went into evidence as to the utility or inutility of the road. There was a verdict for the presentment.

THE TWELVE JUDGES unanimously ruled, that the passing of the presentment was *primâ facie* evidence of its legality, and threw the *onus* of objection on the traverser(*a*).

(*a*) *Vide* 6 & 7 W. 4, c. 116, s. 55.

IN the Matter of PROSECUTORS' EXPENSES, as to Fees payable to the Clerk of the Crown.

April 27, 1825.

BUSHE, C. J., referred the following case to the Judges, for consideration :—

The clerk of the crown is not of right entitled to the fees of 2*s.* 2*d.* and 6*s.* 8*d.* for searches in the crown office, and copies of informations, as part of the expenses of prosecution under a Judge's order, unless in cases where the copies were actually furnished, and were necessary.

The Judge has a discretion in ordering the expenses of prosecutors to be paid to them.

The clerks of the crown are bound to produce the informations in his office to the court, when ordered, without any fee.

" Having found a difference of practice prevailing on the Leinster circuit, as to the manner of preparing Judges' orders for the expenses of prosecutors and witnesses, under the 55 Geo. III. c. 91(*a*), I have respited some of those orders, for the purpose of taking the opinion of the Judges on the legality of some charges contained in them. In the counties of *Wicklow*, *Wexford*, and *Kilkenny*, the clerk of the crown charges, as part of the expenses of the prosecution in such cases, a fee of 2*s.* 2*d.* on any search in the crown office, 6*s.* 8*d.* for the copy of each indictment, and 6*s.* 8*d.* for the copy of each information. In the counties of *Waterford* and *Tipperary* no charges of any kind are made by the clerk of the crown, when the expenses of prosecutors are ordered by the court under the statute. They do charge those fees *against the Crown Solicitor*. The clerk of the crown for *Wicklow*, *Wexford*, and *Kilkenny*, alleges, that the prosecutions cannot be carried on with effect without such copies; that he is not bound to furnish them, or give an inspection of the

(*a*) The provisions of this act have been extended by the 1 W. 4, c. 57, to all cases of prosecution, by the crown officers and otherwise; and the provisions of both have been adopted by the 6 & 7 W. 4, c. 116, s. 105. It would seem that the 6 & 7 W. 4, c. 116, s. 110, did not apply to this case, the fees in question not having been the subject matter of presentment, and therefore not commuted for salary.—See the case of *Criers' fees*, *ante* p. 33.

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originals, gratis; that his fee is under the 49 Geo. III. c. 101, a lawful fee, always paid to him by prosecutors who prosecute at their own expense, and always charged by him against the Crown Solicitor, and paid by that officer to him in prosecutions carried on by him; and that not being a fee that was ever at any time paid by presentment, it is not amongst those which have been commuted for salary by the 4 Geo. IV. c. 43."

It was the opinion of ELEVEN JUDGES present (*Smith*, B., being absent), that the fees in question should not be allowed by the Judges, except in cases where the copies were actually furnished and were necessary; and that the Judge has a discretion in ordering the expenses of prosecution. They also held, that the clerk of the crown is bound to produce the informations in his office to the court, when ordered, without any fee.

April 27, 1825.

IN the Matter of PROSECUTORS' EXPENSES.

Where the bills are ignored, no order can be made for a prosecutors' expenses under 55 G. 3, c. 91, s. 1.

AT the Spring Assizes for the County of *Kilkenny* in 1825, claims having been made for orders for the expenses of prosecutors, under the 55 Geo. III. c. 91, s. 1(*a*), *Bushe*, C. J., reserved several questions for the opinion of the Judges, and amongst them the following:—

Is the party, who has retained a counsel, or solicitor, or both, or has gone to the expense of taking out copies of the informations from the crown office, entitled to an order

(*a*) See the note to the preceding case.

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for his expenses, under the 55 Geo. III. c. 91, s. 1, if the bill of indictment, or all the bills of indictment, if more than one, shall have been ignored by the grand jury?

ELEVEN JUDGES (*Smith*, B., being absent) unanimously agreed, that the party is not so entitled; the wording of the statute being express, and extending only to cases of conviction or acquittal (*a*).

(*a*) The other questions reserved were, whether a party who employs counsel or an attorney, knowing that the crown-solicitor would act, was entitled to an order for his expences; and whether he was so entitled, where he did *not* know it. The first question was answered in the negative; and the second, by holding that it was discretionary. But the doubt upon this subject has been removed by the 1 W. 4. c. 57, which extends the provisions of the 55 G. 3, c. 91, to cases of prosecutions by the law officers of the crown; and by the 6 & 7 W. 4. c. 116, s. 105.

April 27, 1825.

IN the Matter of a Presentment for a MEDICAL OFFICER of a prison by the Grand Jury of the Co. of WICKLOW.

Where there was but one medical officer to a county prison, the grand jury were bound to present for him the entire sum mentioned in the schedule to the 4 G. 4, c. 43.

IN consequence of a presentment offered to *Bushe*, C. J., at the Spring Assizes for the County of *Wicklow* in 1825, his Lordship reserved for the opinion of the Judges the following question:—

If there be but one medical officer to a prison in a county at large (for instance a surgeon), is he entitled to a presentment for the whole salary mentioned in the schedule to the 4 Geo. IV. c. 43(*b*)? Or are the grand jury at liberty to present a part of that sum as his salary?

(*b*) The schedule to the 6 & 7 W. 4, c. 116, is nearly similar.

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It was held by ELEVEN JUDGES (*Smith*, B., being absent), that the medical officer was entitled to a presentment for the whole salary, and that the Grand Jury were bound to present the entire(*a*).

(*a*) See 6 & 7 W. 4, c. 116, s. 110, which authorizes a diminution where there has been a neglect of duty.

April 27, 1825.

IN the Matter of Presentments for MEDICAL OFFICERS of Bridewells in the Co. of WICKLOW.

A medical officer cannot be lawfully appointed by a county grand jury for a *bridewell*.

The amount of a bill for medicines for prisoners in a bridewell may be presented, if furnished by the apothecary of the county gaol, but not otherwise.

IN consequence of presentments offered to *Bushe*, C. J., at the Spring Assizes for the County of *Wicklow*, in 1825, and the Summer Assizes for the same county in 1824, relating to the District Bridewell of *Baltinglass*, in that county, his Lordship reserved the following questions for the opinion of the Judges :—

1st, Can a physician, surgeon, or apothecary, be lawfully appointed and paid by the Grand Jury of a county at large, for a bridewell, whether district or otherwise?

2ndly, Can the amount of an apothecary's bill, for medicines or other necessaries for prisoners in a bridewell, whether district or otherwise, be lawfully presented?

3rdly, If the amount of said bill can be legally presented, can it be presented for any apothecary, except the apothecary to the county gaol?

ELEVEN JUDGES (*Smith*, B., being absent) unanimously agreed upon the following answers :—To the first question : that there can be but one physician, surgeon, or

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apothecary, for all the prisons in the county, and that therefore a medical officer cannot be appointed by a county Grand Jury for a bridewell. To the second question: that the amount of the apothecary's bill for prisoners in a bridewell can be presented for, if furnished by the apothecary of the county gaol. The third question was answered in the negative(*a*).

(*a*) These questions depended on the enactments of the 50 G. 3, c, 103, ss. 3, 9, 50—54, and the 3 G. 4, c. 64, ss. 26, 28, 31—36, which are now repealed by the General Prison Act, 7 G. 4, c. 74. But the decision may probably apply to that Act.—*Vide* ss. 72, 74.

IN the Matter of a PRESENTMENT for a COURT HOUSE, in the County of CAVAN.

April 27, 1825.

A presentment of a sum for additional works done in a new court house, not included in the original contract, is illegal, under the 53 G. 3. c. 131.

THE Grand Jury of the County of *Cavan* having presented that a new court house should be built in the town of *Cavan*, overseers were appointed under the statute 53 Geo. III. c. 131(*b*). A contract for the building of such court house, pursuant to a plan and estimate, was duly entered into, and approved of by the subsequent Grand Jury. After the work specified in the contract had been finished, the overseers being of opinion that several additions were requisite, for the purpose of making the building more commodious, gave direction to the contractors to make such additions to the work, which were accordingly executed. An account of the expense of said additional work, entitled, "A bill of sundry additional "works done in the new court house of *Cavan*, not in- "cluded in the contract; materials furnished by *Williams*

(*b*) This act is still in force, taken in connexion with s. 69 of 6 & 7 W. 4, c. 116.

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" and *Cockburn*," was furnished by the contractors to the overseers, amounting to the sum of £975 9*s.* 8*d.*; which account having been submitted to, and investigated by, the Grand Jury at the last assizes, was approved of by them, and the following presentment was made: " We " present the sum of £1,000 to the commissioners of the " new court house, in aid of £6,000 already borrowed, for " sundry works executed in said court house; said sum " of £1,000 to be levied by successive yearly instalments " of £50 each," &c. It occurred to *Vandeleur*, J., that this presentment, although under the circumstances perfectly just, was not authorized by any statute, and he therefore respited it, in order to obtain the opinion of the Judges, as to whether it was legal or not.

TEN JUDGES met, six of whom (BUSHE, C.J, MOORE, J., JOHNSON, J., JEBB, J., BURTON, J., and VANDELEUR, J.,) were of opinion, that the presentment for additional works over and above the sum originally presented and contracted for, was illegal under the 53 Geo. III. c. 131. The other four Judges were of a contrary opinion. But all the Judges being of opinion, that the sum expended ought to be paid, *Vandeleur*, J., signified this opinion to Mr. *Goulburn*, the Under Secretary for Ireland, with a recommendation, that government would make some provision for the purpose.

THE KING *v.* JOHN CRONE.

April 27, 1825.

Where a statute made the stealing of a promissory note larceny, and a subsequent statute provided for the punishment of receivers of stolen "goods or chattels;" *Held* that promissory notes were "goods" within the meaning of the latter Act.

THIS case was reserved by *Pennefather*, B., from the Spring Assizes at *Cork*, in 1825, for the opinion of the Judges.

The prisoner was convicted of receiving a promissory note, knowing that it had been before feloniously stolen. It was objected by his counsel that the stealing of a promissory note was not an offence at common law; that it became so in consequence of the 3 Geo. II. c. 4, sec. 3; that the 4 Anne, c. 9, sec. 4, and 8 Anne, c. 8, for the punishment of receivers of stolen goods, did not extend to receivers of promissory notes, which are not "goods or "chattels;" and that the 3 Geo. IV. c. 24, for the punishment of receivers of "stolen securities," did not extend to Ireland.

The questions proposed by the learned Judge, were—1st. Whether the 3 Geo. IV. c. 24, extended to Ireland? 2ndly. Whether the conviction was good independently of the statute?

ELEVEN JUDGES (*Smith*, B., being absent), were of opinion that the conviction was right under the 23 & 24 Geo. III. c. 45, which makes it a misdemeanor to "buy or receive any "goods or chattels, knowing the same to have been stolen." It was so decided by the majority of the Judges in 1809, in the case of *Rex* v. *Grey*, *Mayne* and *Day*, J. J., dissenting(*a*). It was thought unnecessary to declare any opinion whether the 3 Geo. IV., c. 24, extended to Ireland; the ground of the decision of the Judges being that the

(*a*) See Hayes' Criminal Law, 24.

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3 Geo. II. c. 4, makes it felony to steal bank notes, &c.; and that the 23 & 24 Geo. III. c. 45, makes the receiving of "stolen goods" a misdemeanor, punishable as such, and an offence which may be tried before the trial of the principal offence; and that bank notes, &c., are comprehended within the meaning of the word "goods," they being made the subject of larceny by the statute 3 Geo. II. c. 4.(*a*).

(*a*) The Act 23 & 24 Geo. 3, c. 45, is now repealed, (as are also the other Acts referred to in this case); and the Act now in force respecting receivers of stolen property, the 9 G. 4, c. 55, s. 47, makes the receiving a "valuable security" a punishable offence. The question, therefore, cannot arise again, and this case is merely an authority so far as it illustrates the meaning of the words "goods and chattels."

THE QUEEN *v.* FULTON.

Michaelmas, 1825.

An indictment for having in possession a forged note of the Royal Bank of *Scotland*, with intent to utter it, cannot be supported at common law.

MARGERY FULTON was convicted before *Jebb*, J., at the Summer Assizes for the County of *Down*, in 1825, on an indictment charging her with having in her possession a forged note of the Royal Bank of *Scotland*, knowing it to be forged, and with intent to pass it as a genuine note. The indictment was framed on a decision of the twelve Judges in Ireland, in the case of *Rex* v. *Willis*, in 1797(*b*), according to which several convictions had since taken place. But as it appeared from the cases of *Rex* v. *Heath*(*c*), and *Rex* v. *Stewart*(*d*), then recently published, that the twelve Judges in England had decided that this was not a

(*b*) This case appeared from a certificate of *B. Riky*, esq., Clerk of the Crown, to have been as follows: At the Commission Court in *Dublin*, on December 9, 1797, *Anthony Willis* was indicted for that he had knowingly in his possession 50 pieces of counterfeit money and coin made to resemble shillings, with intent to utter them, and was found guilty. A question having been reserved, whether the indictment contained any offence at common law, the Judges were unanimous in supporting the conviction. The prisoner was sentenced to three months imprisonment.

(*c*) Russ. & R. 184. (*d*) Russ. & R. 288.

misdemeanor, on the ground that no act was charged to have been committed. The opinion of the Judges was requested as to whether this conviction was legal.

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The learned Judge added, that the evidence would have fully sustained an indictment for disposing of and putting away the forged note, under the 45 Geo. III. c. 89, s. 1(*a*); and that it was a very fit case for such a prosecution, as the prisoner appeared to be an extensive dealer in forged notes; or it would have sustained an indictment for procuring a forged note with intent to utter it, on the authority of *Rex* v. *Fuller* and *Robinson*(*b*). He, therefore, further requested the opinion of the Judges, whether in case it should be held that the conviction was wrong, it would be proper to recommend the prisoner to a limited pardon(*c*), extending to this conviction only, and that the prisoner should be detained until the next Assizes, to be indicted for disposing of, and putting away a forged note, or for procuring a forged note with intent to utter it.

THE JUDGES unanimously ruled that the indictment was bad, and that a pardon should be recommended; but that the prisoner should be detained for a further indictment(*d*).

(*a*) Repealed by 1 W. 4. c. 66, s. 31.—But see the 39 G. 3. c. 63. s. 1.
(*b*) Russ. & R. 308.
(*c*) See Russ. & R. 411.
(*d*) The case of having in possession, with intent, &c., *gold* or *silver coin*, is now provided for by the 2 W. 4, c. 34, s. 8; and the 39 G. 3. c. 63, s. 5, and the 49 G. 3. c. 13, s. 2, make the having in possession with intent, &c., Bank of *England* or *Ireland* notes felony. But the case of a *Scotch* bank note appears to be the same as that of any private promissory note, the possession of which, though the note be forged, and the possession be with intent, &c., is no offence either at common law or by statute.

Jan. 25, 1826.

THE KING *v.* ROSSITER.

In an indictment for robbing a mail of a bag of letters, it is not necessary to state an asportation, but it is sufficient to use the words of the statute.

Simon Rossiter was tried and convicted before *Johnson*, J., at the Summer Assizes at *Wexford*, in 1825, for a mail coach robbery. The indictment was under the 23 & 24 Geo. III. c. 17, s. 37(*a*), and contained three counts. The first (as far as it is necessary to state it for the present question), charged that the prisoner "did felo- "niously rob a certain mail in which letters were then and "there sent by post." The second charged that he did "feloniously steal and feloniously take from and out of a "certain bag in which letters were then and there sent by "the post, &c., a certain letter," &c. The third charged that the prisoner "feloniously did steal and feloniously "take from and out of a certain mail sent by post, &c., a "certain bag of letters," &c. The indictment laid the offence against the peace and statute.

The prisoner's counsel moved in arrest of judgment, on the ground that the offence with which the prisoner was charged was a larceny created by statute, and that the description of a larceny created by statute (necessary to appear, and to be stated in an indictment for such an offence), did not differ in the respect to be presently noticed, from the description of that offence in an indictment for larceny at common law; and that in the latter case it was essential the indictment should state an asportation or carrying away; or, in the words always used in such an indictment, that the

(*a*) This Act is repealed by the 1 Vict. c. 32. But the case will perhaps apply equally to an indictment under the corresponding enactment now in force, viz. 1 Vict. c. 36, s. 28.

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prisoner "did feloniously take and carry away;" and that in an indictment for a larceny created by statute, it is not sufficient to state the offence in the words of the statute, without charging a taking and carrying away. He cited 1 Hawk. 142, 153, 207, 211; Chitt. C. L. 919; 2 East's C. L. 554-576; Hale's P. C. 190; 2 Leach's C. L. 932. The learned Judge respited the sentence until the opinions of the Judges should be known.

THE JUDGES were all of opinion that the conviction was right upon the second and third counts; that the statute constituted a new species of offence, and did not refer certain acts to a known species of crime; and that it was sufficient to use the words of the statute. Some doubts were expressed, but no opinion was given, as to the sufficiency of the first count.

THE KING *v.* REILLY.

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A person entrusted to drive a number of sheep a certain distance, and on the way separating one of them from the rest, with the intention of fraudulently converting it to his own use, is not guilty of larceny. In such a case the *animus furandi* upon the original taking should be left to the Jury.

THE following report was submitted by Sir *Jonas Greene*, Recorder of *Dublin*, to the Judges.

"The prisoner was indicted for stealing a sheep, the property of *George Guest*, and was found guilty, under the following circumstances: Mr. *Guest*, who resided in *Liverpool*, stated, in substance, that he bought upon Thursday the 30th of June last, a lot of 30 sheep, in *Smithfield* market; that he had them directly after the sale branded upon the back with his own brand, and arranged through persons of the names of *Wilson* and *Graham*, that they should be driven on the same day to the water's edge, for

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the purpose of exportation to *Liverpool*. That he set off himself immediately for that town, but that after his arrival there, he received only 29 sheep, instead of the 30. That he thereupon returned to *Dublin*, and that on the 6th of July, being the Wednesday next after the purchase, he saw the missing sheep in a field near *Dublin*. *Samuel Fisher*, the next witness, being examined, swore that on the same Thursday mentioned by Mr. *Guest* as the day of the purchase, the prisoner and another man were driving a lot of sheep down *Great Brunswick-street* (which appeared to have been the route to the *Pigeon House*); that he was standing at the time in his timber yard, which opens upon the street, when the two drivers solicited permission to leave one of the sheep, which they represented to have tired, for some time in his yard; that he in consequence took from them a sheep, (which was proved to be the one identified by Mr. *Guest* upon his return to *Dublin*, as the missing sheep), and that the drivers thereupon proceeded forward in the same direction as before. That, however, suspecting a fraud, he took measures with the police, by means of which the prisoner, who called the next morning for the sheep, was apprehended. The peace officer who made the arrest was examined, and proved declarations of the prisoner as to the property of the sheep, which I do not consider it for the purposes of this case necessary to detail. I should have observed, that Mr. *Guest* did not accompany the drivers.

"Neither of the persons (*Wilson* and *Graham*), alluded to by Mr. *Guest*, was examined, and the case in some respects came imperfectly before the Court; however, it was to be collected from all the circumstances, and such was the opinion of the jury, that the prisoner and his

companions were of the class of persons who drive for hire, from *Smithfield* market, cattle which may happen to be purchased there, to such places as the purchasers or those acting for them may direct. The prisoner was not defended, and produced no witnesses.

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" It did not appear to me that there was any reasonable ground for presuming that the sheep were taken by the drivers originally (I mean upon the delivery for the purpose of being driven), with any felonious intent, and I did not, therefore, in terms present that consideration of the case to the jury. I thought, however, that the case might be reasonably assimilated to the familiar one in the books of a carrier separating part of what he is entrusted to carry from the residue, and embezzling such part; and I directed the jury, if they were satisfied that the lot of sheep the prisoner and his companion were driving, was the one purchased by Mr. *Guest*, and that whilst driving them upon the occasion stated, they singled out and took from the lot at large the sheep in question, with the intention of fraudulently converting it to their own use, to find in such event the prisoner guilty. He was found guilty accordingly.

" I determined to reserve the question as to the propriety of my direction, for future consideration. I have, accordingly, reflected upon it a good deal, and adverting to some modern determinations in *England*, but particularly the case of *Rex* v. *Madox*, Russ. and Ry. Cr. C. 92, I apprehend that my direction to the jury was erroneous, and that I should in the circumstances and event supposed in that part of my charge, have directed an acquittal. I

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think it right, however, to submit the case to the consideration and decision of the Judges."

THE JUDGES were unanimously of opinion that the conviction was wrong; that the prisoner was not a servant, but a special bailee, and that according to the adjudged cases there was not such a severance of the sheep as to put an end to the bailment. They also held that the *animus furandi* should have been left to the jury(*a*).

(*a*) Vide *Rex* v. *Stock*, 1 Mood. C. C. 87.

THE KING *v.* SHEEHAN.

Feb. 15, 1826.

Held, unanimously, by eleven Judges, that the testimony of an accomplice, though altogether uncorroborated, is evidence to go to a jury; that a conviction upon such evidence is legal; and that there can be no general *rule* as to the cautionary directions to be given to the jury respecting his evidence. But *held* also (by six Judges to five), that the jury should, in the generality of cases, be told, that it was the *practice* to disregard the accomplice's testimony, unless there was some corroboration; and that corroboration as to the circumstances of the case merely, and not as to the *person* charged, is deserving of very slight consideration.

DAVID SHEEHAN was indicted for burglary in the house of *Thomas Cummings*, on the night of Thursday, the 9th of December, 1824, and was tried before *Moore*, J., at the Spring Assizes for the City of *Waterford*, in 1825. *Thomas Cummings* deposed, that on the night of the 9th of December, when he was in bed in his house at *Drumrisk*, the door (which had been fastened) was broken in a little before midnight, and four persons entered. He saw there were four by the light of the moon. They made him cover his head, and threatened to murder him if he looked up; he could not therefore see their faces. They asked for arms; he had none, and told them so. They lighted a candle and searched, and remained nearly an hour in the house. There was one all the time over him as a

guard. When they went away, he got up and lighted a candle. All his and his family's clothes were taken. On the 11th, several of the articles that had been taken, were found by him in the house of one *Eleanor Purcell*, in *Waterford;* and a cloak of his wife was found in the house in which *James Sullivan* (the accomplice after mentioned), was apprehended.

Mary Cummings, wife to the last witness, deposed generally to the same facts, and identified the cloak, and several other of the articles.

James Sullivan, an accomplice, stated, that on Thursday night, two weeks before Christmas, he and the prisoner, *Sheehan*, and two others, went to the house of *Thomas Cummings* to commit a robbery. They had planned it two nights before. The prisoner, *Sheehan*, observed it was a snug place, and that there was no danger in going. *Sheehan* and the others came to witness's lodgings in *Waterford* for the purpose, and they set out about 9 o'clock—it was about six miles' distant. They were something more than two hours going. The door was fast; they forced it in, and all four went in; they asked was any stranger within, and were answered there was none; they then directed the persons in bed to cover their faces, or they would injure them. The prisoner, *Sheehan*, then lighted a candle, and gave it to witness to hold. They had two pistols. There were two beds in the room. After being told there were no strangers, and before lighting the candle, they asked for arms, and were told there were none. They gathered all the clothes in two bundles, and went off, making short cuts to avoid the road; and about a mile from the town, they divided

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the things taken. The cloak that the former witness identified, fell with other articles to his share.

The learned Judge left the case to the jury, with the usual observations as to the jealousy and suspicion with which they ought to receive the evidence of an accomplice; directing them not to act upon it, unless in their opinion it were corroborated by the testimony of the other two witnesses, if they considered them entitled to credit. The jury found the prisoner guilty, but recommended him to mercy, which was extended to him, so far as to save his life; but considering the doubts which had been then lately suggested, where the corroborative matter is general, as to the mere details of the transaction, and does not substantiate any thing which the accomplice has said respecting the prisoner personally, the learned Judge reserved the question, whether in this case there was any evidence for the consideration of the jury, to corroborate the accomplice, as to the prisoner *Sheehan* being one of the burglars.

ALL THE JUDGES being present, except O'GRADY, C.B., they were unanimously of opinion, that the charge and the conviction were right; and that in point of law, the testimony of an accomplice, though altogether uncorroborated, was evidence to be submitted to a jury, and that a conviction upon it would be legal. But a long discussion took place, respecting the *practice* on the subject of accomplices, and the manner in which Judges ought to advise jurors with regard to the credit to be given to them, and to the degree of weight to be attached to certain particulars deposed to by unimpeached witnesses, as confirmatory of the accomplice's testimony; and the

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Judges, with regard to these questions, delivered their opinions *seriatim*.

It was the opinion of Lord NORBURY, C. J. C. Pleas, M'CLELLAND, B., BURTON, J., PENNEFATHER, B., and TORRENS, J., that the credit of an accomplice ought, generally speaking, to be offered to the jury, like the credit of *any other man of impeached character*, and that, generally speaking, a corroboration in the circumstances of the crime charged, though entirely unaccompanied by any circumstance applicable to the prisoner on trial, or to any other person charged by the accomplice, was a substantial corroboration, fit to be examined and weighed. That there ought not to be any rule of practice, by which juries should be advised to disregard, or to pay slight attention to, such circumstances of corroboration as above mentioned. It was the opinion of BUSHE, C. J., SMITH, B., MOORE, J., JOHNSON, J., VANDELEUR, J., and JEBB, J., that an accomplice was in *degree* to be treated differently from other witnesses of impeached character; and that a jury, besides being cautioned to regard him with jealousy, ought to be told, that it was the practice to disregard his testimony, unless there were some corroboration. With regard to corroboration, it was the opinion of these Judges, that the accomplice being supported in his narrative of the transaction only, without corroboration as to any person charged, was so slight a confirmation, as to be entitled to very little, if any, attention, and that a jury should generally be so told. They thought so on these grounds: that *ex concesso*, an accomplice was concerned in the crime, and knew all the facts; that it was his interest to relate the facts only, because otherwise he would run the risk of differing from

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the account given by some person present at the commission of the crime; therefore, that his uttering truth, with regard to the facts, did not lead to the inference, that he also told truth with respect to the persons concerned, unless he had reason to suppose that there was some unimpeached witness, who could also prove, that the persons charged by him were the persons concerned; and, inasmuch as in the case supposed, no such person appeared on the trial, he might well suppose that their persons were unknown, and could not be identified, so that he might safely charge whom he pleased.---The Judges all agreed, that there could not be a *rule* on the subject, but that each case must stand on its own circumstances. The difference between them was, as to the *practice* in the generality of cases; the first-mentioned Judges holding, that it ought not to be considered, and that juries ought not to be advised that there was any such practice as above-mentioned, and that the question should be submitted to the jury, with cautionary directions, more or less strong, according to the particular circumstances of the case: the latter Judges holding, that juries ought, generally speaking, to be told of the practice, and to be advised to acquit, where there was no confirmation whatsoever, and ought also to be told, that a mere confirmation in the circumstances of the transaction, not brought down in any respect either to the prisoner on trial, or to any other person charged by the accomplice, generally speaking, scarcely, if at all, distinguishes the case from one of no confirmation.

In this case, the prisoner was recommended for pardon.(*a*)

(*a*) For the opinions of the late Lord *Chief Baron Joy* upon the subject of this case, see his *Treatise "On the Evidence of Accomplices,"* 1836. See also *Rex* v. *Birkett, Russ. and Ry.* 251.

THE KING at the Prosecution of the Bank of Ireland *v.* GETTY.

April 19, 1826.

The prisoner was convicted on an indictment for having in his possession a forged note of the Bank of *Ireland*. The first count set out the note with the name of a signing clerk annexed: the second set it out, as if the name of the signing clerk had been obliterated. The note when produced agreed with that set out in the second count, but no evidence was given as to the obliteration. *Held* that the conviction was bad.

THE prisoner was tried before *Johnson*, J., upon an indictment, of which the first count stated the note with the name of a signing clerk of the Bank of *Ireland* annexed, and as the note would appear if the forgery were complete, and no obliteration had taken place. The second count set out the note, as it appeared when produced in evidence, that part on which a signing clerk's name would appear, if such name had ever been annexed, being obliterated, and being, in fact, worn away; but no trace of such signature appeared. No account was given in evidence how the obliteration, if such there had been, was effected, nor, in fact, what particular name had been there, if any such ever had been affixed. The question was, did the evidence support the first count?— and if not, could the indictment be supported on an instrument, such as that stated in the second count?

The prisoner was convicted, but sentence was respited, until the opinion of the Judges should be known.

THE JUDGES were unanimously of opinion, that the conviction was bad.

May 31, 1826.

THE KING *v.* JOHN WHITE LARKIN.

The prisoner was convicted upon two indictments, one for shooting at A, with intent to kill him, and the other for shooting at B, with intent to kill him; the jury finding that he intended to kill whichever the shot should strike, but not both. *Held* that he was rightly convicted.

It is no defence to such an indictment that the offence was committed in resistance to the execution of a Civil Bill ejectment decree, and that no affidavit verifying the Civil Bill had been lodged with the Clerk of the Peace.

THE prisoner was indicted under the *Ellenborough* Act, 43 Geo. III. c. 58 (*a*), before BUSHE, C. J. at the Spring Assizes at *Clonmel* in 1826, upon two indictments; the first was for firing a shot at *James Jones*, with intent to murder him. The second was for firing a shot at *John Canterell*, with intent to murder him. The evidence was, that *Jones* and *Canterell*, as assistants to a bailiff under a special warrant upon a decree in a civil bill ejectment, endeavoured to execute the warrant, and were resisted by the prisoner, who fired a loaded pistol at them. The jury found him guilty upon both indictments, but stated to the Judge, that they believed he fired at both *Jones* and *Canterell* with intent to kill whichever of the two the shot should strike; but that they did not believe he intended to kill both. The learned Chief Justice reserved for the consideration of the Judges the question, whether the convictions were right. A written argument on behalf of the prisoner was submitted by *T. B. C. Smith*, his counsel, to the twelve Judges; in which he referred to the following authorities: Esp. Law of Actions on Statutes, 54; *Gastineaux's case*(*b*); *Curtis* v. *the Hundred of Godley*(*c*); *Rex* v. *Shepherd*(*d*); *Rex* v. *Austen*(*e*); *Rex* v. *Taylor*(*f*); *Rex* v. *Empson*(*g*); 1 East's Cr. L. 412; *Rex* v. *Duffin and Marshall*(*h*).

(*a*) Now repealed; but the 1 Vict. c. 85, s. 3. contains nearly similar provisions.

(*b*) 1 Leach, 417.
(*c*) 3 B. and C. 248.
(*d*) 1 Leach, 539.
(*e*) Russ. and R. 490.
(*f*) Russ. and R. 373.
(*g*) 1 Leach, 224.
(*h*) Russ. and R. 365.

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NINE JUDGES (viz: Lord NORBURY, C. J. C. Pleas, O'GRADY, C. B., M'CLELLAND, B., MOORE, J., JEBB, J., BURTON, J., PENNEFATHER, B., VANDELEUR, J., and TORRENS, J.,) were clearly of opinion that the convictions were right. They held it to be fully established by the authorities (*a*) that if there be malice against one, and the shot be fired with a malicious intent against him, and it should strike another against whom there was no malice, yet the offence under the act is complete; and that if a shot be fired at several, with intent to kill any one of them whom the shot might strike, the law infers a malicious intent against any one who may be struck, and consequently against all who may be struck; and that it is quite analogous to the case of murder, where under such circumstances if one should be killed, though there was no malicious design against him in particular, it would clearly be murder.

SMITH, B., also thought the conviction good, upon the authorities, though but for the authorities he would have had doubts.

BUSHE, C. J., thought the findings were contradictory.

JOHNSON, J., thought the convictions bad. He considered the intent to be a question for the jury, and that as there were two indictments, one stating an intent to kill *Jones*, and the other an intent to kill *Canterell*, the verdict in the first negatived the intent laid in the second indictment; and *vice versâ* the verdict in the second negatived the intent laid in the first.

(*a*) See *Rex v. Bailey*, Russ. & R. 1; *Rex v. Hunt*. 1 Mood. C. C. 93; and *Rex v. Gastineaux*, 1 Leach, 417.

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Another point was reserved in this case. By the statute (*a*) under which the civil bill decree was made, it is required that an affidavit shall be made, and lodged with the Clerk of the Peace, verifying the contents of the civil bill. It appeared that no such affidavit had been made, and it was contended on behalf of the prisoner, that the decree was therefore void, the warrant void, the officer and his assistants trespassers, and resistance justifiable. But THE JUDGES were all clearly of opinion that the objection was unfounded, for that the court having jurisdiction, no error or irregularity in the previous proceedings could affect a warrant legal in its frame.

Nov. 15, 1826.

THE KING *v.* ROGAN and Others.

The prisoner was convicted on an indictment purporting to be for highway robbery, but omitting the words as to *taking from the person* of the prosecutor. *Held*, that this was a bad conviction for highway robbery, but good for larceny.

THE prisoners were convicted before Lord *Norbury*, C. J. C. Pleas, at the *Meath* Summer Assizes in 1826, upon the following indictment, on clear evidence, of a highway robbery. "The Jurors for our Lord the King upon "their oath do say and present that *Richard Rogan*, late "of *Painstown*, in the county of *Meath*, yeoman, *Michael* "*Byrne*, late of the same place, yeoman, and *Bernard* "*Rogers*, late of the same place, yeoman, on the tenth day "of *April*, in the seventh year of the reign of our Sovereign "Lord, George IV., at *Painstown* aforesaid, in the "said county, in and upon one *Joseph Kelly*, in the peace of "God, and of our said Lord the King, then and there "feloniously did make an assault, and him, the said *Joseph* "*Kelly*, in bodily fear and danger of his life then and there

(*a*) 56 G. III. c. 88, s. 7.

" feloniously did put, and four yards of blue cloth, each " yard then being of the value of ten shillings, six pieces " of bazil skins, each piece then being of the value of one " shilling, and three pieces of silver coin, of the current " coin of this realm, called half crowns, each of the said " pieces of silver coin then being of the value of two " shillings and six-pence, of the goods, chattels, and monies " of the said *Joseph Kelly*, then and there feloniously and " violently did steal, take, and carry away, against the " form of the statute in such case made and provided, and " against the peace of our said Lord the King, his crown " and dignity."

When the prisoners were brought up for sentence, Counsel on their behalf moved in arrest of judgment, upon the ground of certain defects and errors in the indictment, and principally because it wholly omitted the usual words of taking from the person of the prosecutor, from whom it had been clearly proved in evidence, that the goods, &c. laid in the indictments, were taken, upon the highway where the prisoners had assaulted him, and where they left him apparently dead. Counsel at both sides finally agreed that the learned Chief Justice should consult the other Judges as to whether any and what judgment should be pronounced; whether capital, as for the high-way robbery, or for a transportable larceny. There was no doubt as to the facts of the case; fear, bodily danger, and violence, had been proved.

THE TWELVE JUDGES unanimously ruled, that this was a bad conviction for highway robbery, but a good one for larceny.

Nov. 15, 1826.

THE KING *v.* JOHN PRENDERGAST.

Conviction for perjury held bad, where an objection was taken in arrest of judgment that the indictment did not state that the false swearing was with respect to a matter essential to the matter in issue; although it appeared *in evidence* that it was so.

THE prisoner was tried before *Johnson*, J. at the Summer Assizes at *Kilkenny*, in 1826, upon the following indictment: "The Jurors, &c. do say and present that *John* "*Prendergast*, late of &c., on &c., at a general Quarter "Sessions of the peace, holden at *Thomastown*, in and for "the County of *Kilkenny*, on &c., before *G. P. Bushe*, "Esq., assistant barrister of and for said County, and one "of the Justices, &c. for the said County of *Kilkenny*, and "duly appointed to hear and determine matters by civil "bill between party and party, and then and there having "sufficient and competent power and authority to admin- "ister an oath in such behalf, was produced as a witness "on the part and behalf of *William Prendergast* and "*Jeremiah Maher*, upon the trial of a civil bill brought "by one *Bridget Burke* against the said *William Prendergast* "and *Jeremiah Maher*, and that the said *John Prendergast* "was then and there in due form of law sworn before the "said *G. P. Bushe* (he having sufficient and competent "power and authority to administer an oath to the said "*John Prendergast* in that behalf), to speak the truth, the "whole truth, and nothing but the truth, touching the "matter then at issue between the said *Bridget Burke* and "the said *William Prendergast* and *Jeremiah Maher*; and "that the said *John Prendergast*, not having the fear of "God before his eyes, &c., did then and there upon his "corporal oath aforesaid, in his examination aforesaid "before the said *G. P. Bushe* (he then and there having "sufficient and competent authority to administer the said "oath), wickedly, wilfully, &c., say, depose, and swear,

" amongst other things, in substance and to the effect " following, that is to say:---that he the said *John Pren-* " *dergast* saw a certain lease or written document purport- " ing to be a lease, which was produced upon the hearing " of the said issue, signed and executed by one *Sylvester* " *Dooly*, as lessor, and by *Patrick Prendergast* and *William* " *Prendergast*, as lessees; and that he also saw the said " lease signed by *J. Barry*, *D. Barry*, and *J. Heron*, as " witnesses to the execution thereof by the said parties " thereto; whereas, in truth and in fact, the said *John* " *Prendergast* did not see, &c.; and so the Jurors aforesaid " do say and present that the said *John Prendergast* on, &c., " before the said *G. P. Bushe* (he then and there having " sufficient power and authority to administer the said " oath to the said *John Prendergast* in that behalf), in " manner and form aforesaid, did then and there wilfully, " wickedly, &c., commit wilful and corrupt perjury, &c." The false swearing was fully and sufficiently proved, and the prisoner was convicted.

It was moved in arrest of judgment, that the indictment was bad, because it was not stated therein that the matter as to which the prisoner was interrogated was material to the matter then in issue. It fully appeared in evidence upon the trial, that the matter as to which the perjury was assigned, was material to the issue on the trial of which the perjury was alleged to be committed. The learned Judge respited sentence, and reserved the point for the consideration of the Judges.

The TWELVE JUDGES unanimously ruled, that this was a bad indictment, and that the conviction was wrong.

Nov. 30, 1826.

THE KING *v.* CHARLES DOGHERTY.

A conviction for manslaughter is sustainable, although there has been no Coroner's inquest, or examination of the body, or evidence of medical witnesses, as to the cause of death; it being sufficient if the cause of death be proved by circumstantial evidence.

The prisoner was tried before *Moore*, J., at the Summer Assizes for the County of *Down*, in 1826, for the murder of *Mary Cummings*, by casting and throwing her against the ground, and with his hands and feet giving her divers mortal bruises on her head, stomach, back, and sides. The evidence was, that the prisoner had been seen on a public road to kick or strike the woman down; that she got up immediately afterwards, and they went together to a public house, where she complained of being sick and tired with travelling. That they left this house together, and half an hour afterwards the woman was found lying in a ditch, her face and temples covered with bruises, and her eyes blackened. The prisoner was standing on the side of the ditch, and he was taken into custody. The woman was removed into a neighbouring house, where she died in about five minutes after her arrival. Her cloak and bonnet were found in the field adjoining the ditch, and there were marks among the bushes and along the road as if something had been dragged across them into the ditch. The prisoner confessed that the bruises which appeared upon the woman had been inflicted by him. There was no Coroner's inquest, nor was the body examined at all; nor was there any evidence of any medical or other person to prove that her death was in consequence of the injuries which caused the external appearances in question; and the Jury having found the prisoner guilty of manslaughter, the learned Judge respited the sentence in order to obtain the opinion of the Judges, as to whether the verdict of manslaughter could be sustained, where no such evidence with respect to the cause of death had been produced.

NINE JUDGES, (Lord *Norbury*, C. J. C. Pleas, *O'Grady*, C. B., and *Smith*, B., being absent,) unanimously held that the conviction was right. 1826. REX *v.* DOGHERTY.

THE KING *v.* MOSES KINSLEY.

Dec. 17, 1826.

THE following report was submitted by Sir *Jonas Greene*, Recorder of *Dublin*, to the Twelve Judges :---

Parol evidence of a confession held to be admissible, it being proved that the confession was not taken down in writing whilst the prisoner was before the magistrate; although there was no proof that it had not been put into writing within two days, under 10 Car. 1, Sess.2. c.18.

"*Moses Kinsley* was recently convicted before me at the Court of Quarter Sessions and Gaol Delivery for the City of *Dublin*, of grand larceny, in having feloniously stolen six plates, of the value of two shillings each, of the goods of *Thomas Ellis*, Esq. I permitted Master *Ellis* to give parol evidence of a confession made by the prisoner before Alderman *Darley;* and I have thought it my duty, in consequence of the extensive application of the principle involved, to reserve for their Lordships, the Judges, the question, whether, under the circumstances hereafter stated, such evidence was legally admissible.

"The prisoner was brought, in the usual course of proceeding, for examination before the Alderman, who explicitly and repeatedly warned him against saying any thing which had a tendency to criminate himself. Questions were put to him thereupon, some by Master *Ellis* himself, but in the presence, and under the sanction of the magistrate; after the lapse of a little time, the prisoner said there was no use in denying the charge, and proceeded to state, in detail, the particulars of his offence. Master *Ellis*, who was the only witness examined to prove

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the confession, before I allowed him to give parol testimony of the prisoner's declarations, was asked by me whether they had been taken down in writing; his answer was, that they had not: an objection however was made on behalf of the prisoner, that they ought to have been reduced to writing after Master *Ellis* had gone away from the office, and the question being asked of him, he said he remained in the office for some time after the prisoner was removed, during which period no such occurrence had taken place; but that he could not state what might have happened after he had withdrawn. The force of the objection would seem to depend upon the 10 Car. 1, Sess. 2, c. 18, s. 3 (vol. 2 of statutes at large, page 77), by which Justices are directed, before they commit in cases of felony, &c., to take the examination of the prisoner, and the information of them that bring him, and the same, or so much as is material to prove the felony, to put in writing, within two days after the examination(*a*); and the objection itself appears to amount substantially to this, that the magistrate himself should be produced to negative the presumption, that the examination had, within the period pointed out by the act, been reduced into writing. I have been informed, that two of the learned Judges, who presided some time since at an adjournment of the Commission Court, accordingly so ruled, but I am not apprized of the particular circumstances of that case: it may have been, that upon the objection being taken, and a suggestion by the Court, that it seemed to be a serious one, the evidence was waived on the part of the Crown, as not necessary, perhaps, to

(*a*) This Act has been repealed by the 9 G. 4, c. 53, s. 1. But its provisions have been re-enacted by the 9 G. 4, c. 54, s. 2, with the exception, that the limit of two days has been omitted.

the attainment of justice; for which reason, and as I know that a great number of convictions have taken place, not only at the Commission but elsewhere, upon the kind of evidence which I suffered in the present instance to go to the jury, I feel it of public importance that the question should be settled by the highest criminal authority in the country.

" The cases principally bearing upon the subject will, I apprehend, be found to be *the King* v. *Jacobs*, 1 Leach, 309; and the *King* v. *Lambe*, 2 Leach, 552; from which the rule seems to be satisfactorily established, that if the fact upon the evidence stands indifferent, whether the confession was reduced into writing or not, the Court will presume it was (such being the Justice's duty), and reject the parol testimony. I am not aware of any reported case applying in terms this presumption (of being reduced into writing) beyond the period of the actual examination of the prisoner, when by being present he would have an opportunity of rectifying errors or omissions, perhaps, indeed, of repudiating the confession altogether, on the principle of incorrectness. Under the statute, it is the duty of the magistrate to return to the next Gaol Delivery the examination, if, in point of fact, it was taken down in writing; no examination was returned to the Court in the case before me. However, it is perfectly clear, that the presumption that the magistrate would do his duty by returning the examination in writing, if there had been one, is not allowed to apply so as to let in parol evidence of the prisoner's confession, where the fact upon the evidence stands indifferent, whether the examination at the time of taking it was or was not reduced into writing. Whether, however, the presumption be equally inap-

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plicable in a case which supposes the reduction to writing to be after the examination, and after the prisoner's retirement from the office, may, perhaps, admit of a different consideration.

" Our statute of Charles is, in the particulars cited, a transcript of the Act of the English Act 2 & 3 Ph. & M. c. 10. Mr. *Peel's* Act of last Session, for improving the Administration of Criminal Justice in *England*(*a*), has repealed the Act of *Philip* and *Mary;* it has re-enacted however (amongst others) the provision in question, omitting the words "within two days after the examination"(*b*). Mr. Justice *Grose*, upon delivering his judgment in Lambe's Case(*c*), adverts to a decision of the Judges in the *King* v. *Hall* and others, in the words following(*d*) :—' At the Lent Assizes for the County of ' Stafford, in the year 1790, one *Hall* and two others ' were tried and convicted on an indictment for burglary : ' the evidence was clear against the two others, but ex- ' cepting one or two slight circumstances, certainly not ' sufficient of themselves to have put *Hall* upon his ' defence ; the only evidence against him was his examina- ' tion before the magistrate, which was not taken in ' writing, either by the magistrate or any other person, ' but was proved by the *vivâ voce* testimony of two wit- ' nesses who were present, and which amounted to a full ' confession of his guilt. The case was saved and re- ' ferred to the consideration of the Judges, whether this ' evidence of the confession was well received, and the

(*a*) 7 G. 4, c. 64.

(*b*) The same alteration has been made in the *Irish* enactment, *vide ante*, p. 68, note.

(*c*) 2 Leach, 552.

(*d*) P. 559.

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'prisoner legally convicted; and all the Judges, except 'Mr. Justice *Gould*, were of opinion, that the conviction 'was right.' It would seem, that neither the magistrate was produced in this case, nor his absence accounted for by death or otherwise.

"I pronounced no judgment upon the verdict, and entered on the crown book a *curia advisari vult*."

It was held unanimously by TEN JUDGES (*O'Grady*, C. B., and *Smith*, B., being absent) that the conviction was right.

In the Matter of a PRESENTMENT made by the Grand Jury of the Co. of GALWAY, to WALTER BLAKE, Esq.

Feb. 24, 1827.

THE following presentment was made by the Grand Jury of the County of *Galway*, at the Summer Assizes in 1826.

The owner of a *yacht* is not entitled to compensation for the malicious burning of it, under the 19 & 20 G. 3, c. 37.

"County of *Galway* to wit.—We present the sum of "£465 11*s.* 8*d.*, Irish currency, to be levied off the County "of *Galway* at large, and paid to the Treasurer, and by "him to *Walter Blake*, Esq., to compensate him for a "malicious burning. For self and fellows,

"DUNLO, Foreman."

Mr. *Blake's* petition was for "setting fire to and con- "suming his yacht or pleasure boat, which lay in the har- "bour of *Oranmore*, in the Barony of *Dunkellin*." Counsel in support of the presentment referred to the

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29 Geo. II. c. 12; 19 & 20 Geo. III. c. 37; and 4 Geo. IV. c. 73. The presentment was respited by *Smith*, B., the Judge of Assize, who reserved for the consideration of the Twelve Judges the question, whether a presentment for such an injury was warranted under the statutes referred to.

EIGHT JUDGES (*Bushe*, C. J., *Smith*, B., *M'Clelland*, B., and *Vandeleur*, J., being absent), unanimously gave their opinion against the presentment; holding the words "articles and effects" in the 19 & 20 Geo. III. c. 37, to be *ejusdem generis* with those which went before(*a*).

(*a*) Compensation for malicious injuries in any County but the County of *Dublin* is now provided for by the 6 & 7 W. 4. c. 116, s. 135 (and *semble* by the 3 & 4 W. 4. c. 78, s. 70, which section would appear to be still in force as far as relates to the petition to the Judge of Assize); and in the County of *Dublin*, by the above-mentioned Act of 19 & 20 G.3. c. 37. See *Chamley's* case, 1 Jebb & S. 319. The County *of the City of Dublin* is not included in the operation of the 19 & 20 G. 3. c. 37; *Millar's* case, 2 Jebb & S. 271; and it is expressly excluded from that of the 6 & 7 W. 4. c. 116. But a bill has been brought into Parliament (Session 1841) to extend the 19 & 20 G. 3. c. 37 to the County of the City of *Dublin*.—See the case of the *County Carlow Presentment* for a malicious burning, *post*.

May 5, 1827.

THE KING *v.* PHILIP JONES, and Others.

The informations, warrant of committal, and indictment, stated an offence committed on Monday the 12th. In the course of the trial it became necessary to fix the precise date of the offence, which was proved to be Monday the 5th. *Held*, that a conviction under these circumstances was legal.

THE prisoners were tried before *Bushe*, C. J., at the Spring Assizes for the *King's* County, in 1827, upon a charge of burglary and stealing from the dwelling-house, and convicted upon satisfactory evidence; but during the progress of the trial a circumstance was disclosed upon which the prisoner's counsel insisted as rendering any con-

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viction illegal. In summing up the case to the jury, the learned Judge told them that the circumstance insisted upon ought to make them the more cautious in considering their verdict; and after their verdict he reserved for the consideration of the Judges the question, whether it affected in any manner the legality of the verdict. The point was as follows:—The crime was committed on Monday the 5th of March, 1827, and on Tuesday the 13th the prosecutors, who were persons in the lower class of life, went before Mr. *Dames*, a magistrate, and described to him the transaction as having occurred on *the last Monday*, by which he in mistake understood Monday the 12th, and accordingly he, on the 16th of March, drew up, in his own handwriting, informations for the prosecutors, describing the transaction as having occurred on Monday the 12th, to which they swore; and he committed the prisoners on that day by a committal in the following words:—"You are hereby re-"quired to detain in your custody the body of *Philip* "*Jones*, &c., who stand charged before me upon oath for "burglariously entering the house of *Denis Connor*, on "the night of the 12th of March, 1827, and them safely "to keep until legally discharged; and for so doing this "shall be your warrant.—Sealed and dated this 16th day "of March, 1827.

"F. L. DAMES."

"*To the Keeper of His Majesty's*
"*Prison at* Philipstown."

Upon the informations returned to the Crown Office, the Clerk of the Crown framed indictments, stating the offence to have been committed on the 12th instant, upon which indictments the prisoners were tried. In the progress of the evidence it became material to fix the precise day upon which the crime was committed; which being ascertained

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to be the 5th, the prisoners' counsel produced and proved the committal, and insisted that the prisoners, five of whom it appeared lived four or five miles from where the offence was committed, and who were not arrested until the 16th, had been taken by surprise, and were induced to shape their defence by bringing to the Assizes many witnesses to account for them upon the 12th, which witnesses had now become unnecessary; and one of several witnessess who had been produced for another purpose, (viz. that of discrediting the witnesses for the prosecution), swore that she had come fully prepared to prove on the part of some of the prisoners, that on the night of the 12th, they were employed in such a manner, and at such a time, as to make it impossible for them to have been present at the commission of the offence.

The prisoners were sentenced to be executed on the 12th of May, 1827, unless the Judges should be of opinion that the conviction was bad.

It was the unanimous opinion of EIGHT JUDGES (*O'Grady*, C. B., *Smith*, B., *Jebb*, J., and *Torrens*, J. being absent), that the conviction was right.

THE KING *v.* JOHN MARA and PATRICK MULLOWNEY.

May 5, 1827.

Evidence of the prisoner's handwriting by a witness who had never seen him write, but who swore he was enabled to form a belief from opportunities which he had had of knowing his handwriting, independently of comparison; *Held* sufficient, without any other evidence that the prisoner knew how to write.

THE prisoners were tried before *Bushe*, C. J., at the Spring Assizes for the *King's* County, in 1827, upon indictments for burglary and robbery in the dwelling house of *W. P. Vaughan*, Esq., on the 11th of December, 1826. *Mullowney* was acquitted, and *Mara* was found guilty. Part of the evidence against *Mara* was a paper proved to be in his handwriting, which the jailor's assistant had found shortly after the committal of the prisoners, tied round a turf with a string, in the window of a room in which he and many other prisoners were confined, and which was exactly over another room in which *Mullowney* was confined with other prisoners, and which had a window under that in which the paper was found. The jailor had orders to keep these two prisoners separate, and the paper purported to be a communication from *Mara* to *Mullowney*, and contained allusions to the robbery, and to their defence on their trial; which made it a material part of the evidence against *Mara*, which was altogether circumstantial. The prisoner's counsel objected to the evidence upon which the learned Chief Justice allowed the paper to be proved to be in the handwriting of the prisoner, and which was as follows:—Mr. *Vaughan*, the prosecutor, admitted that he had never seen the prisoner write, but swore that he had opportunities of knowing his writing, which enabled him to form a belief about it. Those opportunities were derived from the following circumstances:—The prisoner had engaged with him as his

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herd, in December, 1825, at which time the witness's steward brought to him a paper containing the terms and conditions of the engagement, in the steward's handwriting, and signed in another handwriting, with the prisoner's name, as agreeing to these terms; and Mr. *Vaughan* swore that such was his usual course of hiring such servants, and that the prisoner continued to live with him as herd upon the terms stipulated in that paper, until the 12th of August, 1826, when the prisoner handed to the witness two papers, the first of which purported to be a notice by the prisoner that he would leave Mr. *Vaughan's* service, and the second contained an account of what was due to him under the agreement, and a demand of payment. Mr. *Vaughan* swore that he settled accounts with him accordingly, and discharged him; he proved those papers, and swore that he was enabled (independently of comparison of handwriting), from those opportunities to form a belief on oath as to the prisoner's handwriting, and that upon first seeing the paper offered in evidence, he did form a belief upon it without making any comparison of handwriting, and believed it to be the prisoner's handwriting. The papers produced by Mr. *Vaughan*, which he received from the prisoner, were as follows:—"Sir, I beg leave to let "you know that it is not my convenience to stop in Golden "Grove any longer as herd, on the terms you offer; "therefore I give you notice to provide a herd in my place "as soon as you possibly can. I remain your obedient "servant,

"*John Mara.*"

"*John Mara*, and his man, commenced herd in Golden "Grove, for Captain *Vaughan*, the 16th of December,

" 1825, and continued to the 16th of August, 1826, which " amounts to

" 242 days at 10*d.* per day, . .	£10	1	8
" Do. his man, do. . .	10	1	8
	£20	3	4

" The amount of this I expect you will pay me, as you did " not fulfil your agreement with me. I will give up the " half acre of *Bealor*, if you will allow me for my seed and " labour, or I will pay the value thereof.—12th August, " 1826."

Upon this evidence the learned Chief Justice allowed the paper in question to be read. The prisoner's counsel insisted, among other objections, that evidence ought to have been given to show that the prisoner knew how to write. The jury found the prisoner guilty, and he was sentenced to be executed on the 12th of May, unless the conviction should be held to be bad, upon a question reserved for the consideration of the Judges, as to the sufficiency of the evidence of handwriting.

It was the unanimous opinion of EIGHT JUDGES (*O'Grady*, C. B., *Smith*, B., *Jebb*, J., and *Torrens*, J., being absent), that the conviction was right.

May 5, 1827.

THE KING *v.* MICHAEL CARROLL.

Evidence to support an indictment under the Whiteboy Act.

It is not necessary to prove, by distinct evidence, that the country was in a state of disturbance, if the crime itself be clearly a Whiteboy offence; as the circumstances attending it may demonstrate the country to be in such a state.

THE prisoner was tried before *Torrens*, J., at the Spring Assizes for the County of *Clare*, in 1827, on two indictments. The first was under the Whiteboy Act(*a*), for assaulting the habitation of *Edward Synge*, Esq.. on the 19th of July, 1826. There was a second count for injuring the habitation of the said *Edward Synge*. The second indictment was under Lord *Ellenborough's* Act(*b*), for assaulting the said *Edward Synge*, and being feloniously present, aiding and assisting an unknown person to shoot at the said *Edward Synge*, with intent to murder him; and there were two other counts laying the offence with an intent to maim and disable the prosecutor.

The first witness was *Edward Synge*, Esq. He stated, that he lived at *Carhire*, in the County of Clare; was there on Wednesday the 19th of July; there were himself, three maids, and one man servant, *M. Byrne*, in the house; he was in bed, and was disturbed by a violent knocking and shouting, and firing of arms; the knocking was at the hall door, about two o'clock in the morning, and sounded like persons kicking against it; witness threw up the window of the room where he slept, and saw some figures at the end, and a little in front of the house; he heard several threatening sounds, such as "bloody Antichrist schools," and "come down;" a voice called to him to put in his head, or he would blow out his brains; witness said he

(*a*) 15 & 16 G. 3. c. 21, s. 4. This Act has been amended in some particulars (not affecting the present question), by the 1 & 2 W. 4. c. 44.

(*b*) 43 G. 3. c. 58, now repealed. The 1 Vict. c. 85, s. 4, is the corresponding enactment now in force.

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would not, but afterwards did; there was then a shot fired; he took up a poker, and went down stairs, followed by *M. Byrne;* he could not open the hall door, so he went out of the window, followed by *Byrne;* heard voices say, "they "are coming;" he then ran to the end of the house, and found the prisoner at the wall; the prisoner had a gun with him, but not pointed at witness; witness struck him with the poker, either once or twice; the prisoner was knocked down; witness did not know then whether he was killed; he then returned into the dwelling-house; and then went out again, and met some persons coming towards the yard; there might be three persons; he grappled with one of the persons, who had presented a gun at him, and struggled; the gun was presented and snapped, and whilst struggling with him, witness was struck by his servant, by mistake, on the elbow, whilst he had his arm round the man's neck; witness fell from his servant's blow on his elbow; fell at the man's feet, and grappled his leg and feet, and caught him by the shoes; the man escaped; witness found a hatchet, a gun, a stick, and some other articles, on the ground where the struggle was; he then went to where *Carroll* was lying, and brought him into the house; his person was examined, and cartridges, balls, and powder, and a prayer book, were found on him; witness could not state whether there was any shot fired whilst he was struggling with the man; the school house was burned on that night. Witness identified the prisoner. On his cross-examination, he said that he did not think the person who bid him put in his head had any intention of injuring him; the lapse of time was such as to convince him it was not his intention to shoot him; the prisoner was struck twice by witness, and oftener by the servant; he was left for dead; his jaw bone was broken; the prisoner smelt strongly of whiskey, and

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appeared to have drank a good deal; it was in a lane he had the second struggle, rather at the end of the house; the lane was to the northward of the house; a considerable time elapsed (not quite quarter of an hour), between his knocking down the man and finding him again; found him raised on one hand; he had time to have run away, but remained there from inability to move; heard a snapping or saw a spark of the second gun in the lane; it was before the struggle he saw the spark or heard the snap; the man was between five or six yards distant from him; could not discern the lock of the gun or muzzle, but saw the figure of the gun; there were three figures before him; had said and still thought they did not intend him a personal injury; received no personal injury, save what he received from his servant.

The next witness, *Malachi Byrne*, stated that he was in Mr. *Synge's* employment in July; the first thing he heard was the voices of the people, he did not know how many, outside the house; he put his head out of the window, and there was a shot fired; he did not see the person who fired; went into the drawing-room, and found his master, who asked him to go out; they went out of a window; had a piece of iron in his hand: saw a man (whom he identified as the prisoner), engaged with his master at the end of the house; assisted his master, and knocked the prisoner down; the prisoner had nothing in his hand when witness went up; he went through a lane to the other side of the house; went by the south side of the house, and passed the house; met the man, and saw a flash of fire, as if from the gun going off, and heard the report in the lane; his master and the man grappled with one another; witness struck at him, and his master fell, and the man got away; returned to

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Carroll, and brought him in; found a gun where *Carroll* was lying, and a hat; went out again, and did not see any body; witness found a gun and a hatchet where *Carroll* lay, and found a gun and stick where the second struggle took place; examined the gun found in the lane in the course of the day; the gun was empty, but he could not speak as to the state of the lock; *Carroll's* gun was loaded with powder and shot and ball; witness brought *Carroll* in and searched him, and found ball, and loose powder, and cartridges on him; he thought prisoner had drank liquor, and that he was tipsey. On his cross-examination, he said that he was still in Mr. *Synge's* service.

The case for the crown closed, and the prisoner did not call any witnesses. The jury found the prisoner guilty on the first indictment, and acquitted him on the second; and by consent of the counsel for the crown, the verdict was entered on the first count of the indictment, under the Whiteboy Act. The learned Judge pronounced sentence of death on the prisoner, and fixed the day of his execution for Saturday the 12th of May, in order that in the mean-time the decision of the Judges might be had on two points urged on behalf of the prisoner, and which his Lordship reserved for their consideration. First, whether upon the evidence the facts proved constituted an offence under the Whiteboy Act—and secondly, whether the country not having been proved to have been in a state of disturbance, a legal conviction could be had under the statute?

NINE JUDGES met, (*Smith*, B., *Jebb*, J., and *Torrens*, J., being absent), and SEVEN (*Bushe*, C. J., Lord *Norbury*, C. J. C. Pleas, *M'Clelland*, B., *Moore*, J., *Johnson*, J., *Burton*, J., and *Vandeleur*, J.,) were of opinion that the

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conviction was right; all of these seven (except *Johnson*, J. and *Burton*, J., who had doubts on the first question), holding that it was sustainable on both grounds. *O'Grady*, C. B. and *Pennefather*, B., held that the conviction was wrong on the first ground. *Torrens*, J. (who was absent from illness), sent his opinion that it was right. *Smith*, B., sent his opinion that it was wrong on the first ground(*a*).

(*a*) See this decision referred to by *Bushe*, C. J., in his judgment in *Mitchell* v. *Blake*, 1 Huds. & B. 199.

May 16, 1827.

THE KING *v.* GEORGE GOURLAY.

Embezzlement. The prisoner was a runner of the Bank of Ireland till 6 o'clock every day, and after 6, to G. & W., public notaries. Before 6 o'clock one day he received from D. money to pay bills of exchange which had been discounted by the Bank, and of which, owing to some mistake, payment could not be received at the Bank. The prisoner promised to pay them at the office of G. & W. The same evening after 6 o'clock, he paid a part only, and returned to B. some of the bills as if they had been paid, keeping the rest of the money and bills. *Held*, that the bills and money were received by the prisoner as the servant and clerk of G. & W. and that therefore a conviction for embezzlement in that character under the statute was good.

THE prisoner was tried at the Commission at *Green St.*, before *Burton* and *Vandeleur*, J. J., upon an indictment founded on the 51 G. III. c. 38(*a*), which charged him, "for that he, being a clerk to Messrs. *Gibbons* and *Wil-*"*liams*, and employed and entrusted by them to receive "money, bills, notes, and other valuable securities for "and on account of them, did on, &c. at, &c. by virtue of "such employment and entrustment, receive and take "into his possession for and on account of the said Messrs. "*Gibbons* and *Williams*, divers, to wit, five bills, com-"monly called Bank Post Bills, each for the sum and of

(*a*) This Act is now repealed, but similar provisions are contained in the 9 Geo. 4, c. 55, s. 40.

" the value of £20, and divers other securities, called " Bank Notes, then and there being the property of the " said Messrs. *Gibbons* and *Williams ;* and that the said " *George Gourlay* having so received, and taken into his pos- " session the said notes, &c. for and on account of his said " employers, afterwards, to wit, &c. at, &c. fraudulently " and unlawfully did secrete and make away with the " said bills and notes ; and so the jurors, &c. say that the " said *George Gourlay* so being such clerk, and entrusted " as aforesaid, did fraudulently and unlawfully embezzle " the said bills and notes from the said Messrs. *Gibbons* " and *Williams*, his said employers, on whose account the " same were delivered to, and taken into the possession of " him the said *George Gourlay*, against the peace, and " contrary to the statute."

The facts were these. The prisoner was engaged as a runner of the Bank of Ireland until 6 o'clock in the evening, and after that time as an evening runner of *Gibbons* and *Williams*. According to the practice in the office of *Gibbons* and *Williams*, who were Public Notaries, all bills sent to them by the Bank to demand payment or to protest for the Bank, are divided into five parcels every evening, and distributed by them to five runners to collect, each runner having a distinct walk. On the 2nd of April, 1827, *John Duffy* sent his clerk, *Patrick Bray*, to pay four bills of exchange, which the Bank had discounted for him, and which he had indorsed ; and gave him £194 1*s.* 4*d.*, the amount of the bills ; there were two bank post bills among the notes so given. The clerk in the Bank Post Bill Office refused to mark these two post bills, on account of some irregularity, in consequence of which they would not be taken from *Bray* as payment,

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and he was unable to take up the four bills in the Bank. *Bray* met the prisoner (knowing him to be a runner of the Bank, and also an evening clerk and runner of *Gibbons* and *Williams*) in the runner's office of the Bank between 5 and 6 o'clock in the same evening, and having informed him of the circumstances, asked him to pay the four bills. The prisoner said he would pay them at the office of *Gibbons* and *Williams*. *Bray* then gave him the £194 1*s.* 4*d.* for that purpose. The four bills not being paid in the Bank were sent the same evening, according to the usual course, to *Gibbons* and *Williams* to demand payment, or if not paid, to protest. The bills were then given by *Gibbons* and *Williams* to the prisoner to collect in his walk, in which *Duffy*, the acceptor, lived, and the prisoner signed a receipt for them. He afterwards paid into the office of *Gibbons* and *Williams* the amount of one of the bills, and delivered to *Bray* three of them, but kept the fourth bill, and also kept the amount of three of the bills.

Two questions were left to the jury: 1st, Whether the prisoner took the bank notes and post bills from *Bray* for the purpose of taking up the four bills of exchange when they should be sent to *Gibbons* and *Williams*, as notaries of the Bank? 2ndly, Whether the prisoner had in his possession the bank notes and post bills received from *Bray*, when he (prisoner) delivered to *Bray* the three bills due by *Duffy?* And the jury were directed, if they were of opinion in the affirmative on both questions, to find the prisoner guilty. They found him guilty. But it was contended by the prisoner's counsel, that this was not an embezzling by the prisoner, as the servant or clerk of

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Gibbons and *Williams*, within the statute; and this question was reserved for the opinion of the Judges.

All the Judges being present, EIGHT JUDGES (BUSHE, C. J., Lord NORBURY, C. J. C. Pleas, O'GRADY, C. B., SMITH, B., M'CLELLAND, B., JOHNSON, J., PENNEFATHER, B., and TORRENS, J.,) were of opinion that the conviction was right upon the evidence stated. They held that the bills and bank notes were received in the bank by the prisoner as the servant and clerk of *Gibbons* and *Williams*; and they relied principally on the case of *Rex* v. *Beechey*, Russ. and Ry. 319. The other four Judges (MOORE, J., BURTON, J., VANDELEUR, J. and JEBB, J.,) were of a contrary opinion: they held, that the bills were given to the prisoner, not as servant to *Gibbons* and *Williams*, but as the special bailee of *Bray*, or his employer *Duffy*; for that the prisoner's duty or authority to receive money on account of *Gibbons* and *Williams* did not begin till he commenced his rounds as their runner, to collect payment for bills; and they held that if the prisoner had lost this money, or been robbed of it, before he was sent his rounds, the loss would not have fallen on *Gibbons* and *Williams*, or on the bank.

Jan. 30, 1828. IN the Matter of a PRESENTMENT for the Surgeon of a prison in the County of CAVAN.

A presentment of a salary to a surgeon for attending a gaol under the 7 G. 4, c. 74, s. 72, in addition to his salary under the 5 G. 3, c. 20, and 54 G. 3, c. 62 (Infirmary Acts), *held* to be illegal.

THE following case was submitted by *Torrens*, J., for the opinion of the Judges :—

" By the Act 5 Geo. III. c. 20, entitled, 'An Act 'for erecting and establishing Public Infirmaries or 'Hospitals in Ireland,' it is enacted, 'that the surgeons 'to be chosen or appointed for the respective county 'infirmaries should be paid by the year a sum not ex- 'ceeding £100, to be paid out of the public money.' By the 54 Geo. III. c. 62, entitled, 'An Act for amend- 'ing the former Act, so far as relates to the surgeons and 'apothecaries of county infirmaries,' it is provided, 'that 'the grand juries of the several counties in which such 'infirmaries are established, shall and may present a sum 'not exceeding £100, to be raised off the county at large, 'and to be paid to the surgeon of the infirmary in ad- 'dition to the salary which such surgeon is entitled to 'receive under or by virtue of the aforesaid Act of the '5 Geo. III. or any other Acts then in force in Ireland, 'relating to such infirmaries.' By s. 3 of the last-men- tioned Act, it is provided, 'that it shall not be lawful for 'any grand jury to present such additional salary, unless 'the surgeon, for whom it is presented, shall have given 'his attendance and professional assistance, without any 'other or further fee or reward, to the prisoners and 'others in the gaol of the county, to the infirmary of 'which he has been appointed surgeon, if such gaol be 'situated within five miles of such infirmary.'

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" Surgeon *George Roe* has been for several years past the surgeon of the county infirmary of the County *Cavan*, and the gaol is situate within less than five miles of the infirmary; and Surgeon *Roe* has, up to the Spring Assizes, 1827, attended the gaol of the county without fee or reward, save the salaries given him by the aforesaid Acts.

" By the Act 7 Geo. IV. c. 74, s. 72, it is enacted, 'that the grand jury of every county shall, and they are 'thereby required, from time to time, to appoint a surgeon '(qualified as therein mentioned) to the prisons within 'their jurisdiction, and every such surgeon is required to 'visit every such prison twice at least in every week, to see 'every sick person confined therein, to examine the con-'dition of the hospital, to keep a journal, to enter the 'date of every attendance, &c., and to lay such journal 'before the Board of Superintendance and the grand jury 'at every assizes.' And it is then provided, 'that it 'shall and may be lawful for the grand jury at every 'assizes after such appointment, to present a salary to such 'surgeon,' &c. And it is further provided in the same section, 'that nothing in the said Act contained shall 'prevent the continuance of any medical attendant ap-'pointed before the passing of this Act.' By the 109th section of the same Act, and by the 20th Rule or Regulation for the Management of Prisons, it is provided, 'that 'the physician or surgeon shall examine every prisoner 'who shall be brought into the prison before he shall be 'passed into the proper ward, and likewise examine every 'prisoner before he be discharged, and give his opinion 'whether such discharge be safe.'

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"The grand jury of the Co. *Cavan*, at the Spring Assizes of 1827, submitted a presentment to the then going Judge of Assize of £40 as a half-year's salary to Surgeon *Roe*, in consideration of the additional duties to be performed by him under the 7 Geo. IV. as surgeon to the gaol, and in addition to his salary as surgeon of the county Infirmary. At the last Summer Assizes of the same county, a like presentment for £40 was submitted to me, but I was informed by several of the grand jury, that at the Spring Assizes, the learned Judge who then presided entertained considerable doubts as to the legality of the presentment, and upon conference with that learned Judge, I find such information was correct. As I entertain doubts on the legality of the presentment submitted to me at the last assizes, and the question being one on which an uniformity of practice should prevail, I submit the decision of it to your Lordships."

TEN JUDGES ruled, that the presentment was bad. (*Burton*, J., was absent.) TORRENS, J., held the presentment to be good(*a*).

(*a*) See the 6 and 7 W. 4, c. 116, s. 86.

June 26, 1828.

THE KING *v.* PETER DELEANY.

Shooting a sheriff's bailiff who attempts to arrest under a warrant regular on the face of it, but dated prior to the writ on which it is founded, *held* to be manslaughter only.

A juror having been by mistake entered upon the panel and called and sworn by a wrong name, and an objection having been taken before verdict; *held*, that there was a mistrial.

THE prisoner was convicted at the Commission at *Green-street*, before *Jebb*, J., of maliciously shooting at *John Burnett*, with intent to do him grievous bodily harm. The

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evidence was, that *John Burnett*, a sheriff's bailiff, and who said he had frequently acted as such, received from the sheriff of the city of Dublin a warrant against the prisoner, grounded on a supposed writ of *capias ad satisfaciendum*. The warrant contained the names of *Burnett* and two assistants. He proceeded with his warrant and his assistants to the house of the prisoner about 9 o'clock in the morning, and having obtained admission at the hall-door, went up stairs, followed by his assistants, to a drawing-room, where the prisoner was, along with another man. Upon opening the drawing-room door, his entrance was opposed by the man who was with the prisoner; *Burnett* said aloud, "that he had a writ against Mr. *Deleany*." *Deleany*, the prisoner, went into an adjoining bed-chamber; *Burnett*, who had got into the drawing-room, endeavoured to follow him into the bed-chamber; the other man opposed his entrance, but with the aid of his assistants he got in. Upon getting in, the prisoner was standing before him with a pistol levelled at him; *Burnett* desired the prisoner to drop his pistol and surrender, and immediately went forward to seize him. The prisoner fired the pistol, and shot *Burnett*.

The warrant was proved, and was regular on the face of it, but it was dated the 1st of February, and the writ, which was produced on the trial, was tested the 12th of February, and issued the 29th of February. The sub-sheriff said there was a mistake in the date of the warrant, February being put for March; but this was not proved.

It was contended on the part of the prisoner, that the writ produced not supporting the warrant, *Burnett* acted without legal authority; and that if death had happened

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in the resistance, the offence would have been but manslaughter, and therefore that the prisoner ought to be acquitted(*a*). The case was reserved for the opinion of the Judges.

A further point was reserved, in case the Judges should hold the conviction to have been right. The jury retired to consider their verdict, and upon returning into Court their names were called over as usual; upon the name of *Bernard Flynn* being called as one of the jury, it appeared there was no such person upon the jury, and that a man named *Bernard Fagan* had answered to the name of *Flynn*, and been sworn by that name. There was no person named *Flynn* on the panel, but the sheriff, in transcribing the names, inadvertently wrote *Flynn* instead of *Fagan*, which gave rise to the mistake. It was objected by the prisoner's counsel, before the verdict was delivered, that this was a mistrial. The learned Judge in reserving this latter question referred to *Hill* v. *Yates*, 12 East, 229; *Dovey* v. *Hobson*, 6 Taunt. 460, and 2 Marsh. 154; and *The King* v. *Tremaine*, 7 Dowl. and R. 460; as bearing upon the point.

ELEVEN JUDGES present (*Pennefather*, B., being absent) unanimously ruled, that the conviction was bad upon both the points reserved.

(*a*) This consequence followed from the provision in Lord Ellenborough's Act, 43 G. 3, c. 58 (now repealed), under which the indictment was framed, "that if the acts were committed under such circumstances, as that if death had ensued therefrom, the same would not in law amount to the crime of murder, then the prisoner so indicted should be acquitted." No such proviso occurs in the corresponding Act now in force, 1 Vict. c. 85, which in ss. 3 & 4, distinguishes between the cases where the intent is to commit *murder*, and where it is not.

THE KING *v* WILLIAM MORAN, THOMAS MACKEN, and Others.

Nov. 12, 1828.

Where a witness was called by the Crown, and the Crown declined to examine him, but permitted him to be cross-examined, and then re-examined him; and then produced his depositions to show that what he had therein stated varied from his evidence at the trial: *Held*, that a conviction under these circumstances was wrong.

THE prisoners were tried before *Bushe*, C. J., at the Summer Assizes for the County of *Westmeath*, in 1828, for the murder of *John Mathews*. Two witnesses were examined for the crown, whose names appeared on the crown book as prosecutors; and a third, *William Glynn*, whose name also appeared on the crown book as prosecutor, was called and sworn. Immediately on his being sworn, the counsel for the crown stated that they had changed their minds, and would not examine him; upon which the counsel for the prisoners insisted upon their right to cross-examine him, which was assented to. Upon his cross-examination, he stated some circumstances differently from what had been sworn by the first two witnesses, and favourably for the prisoners; after which the counsel for the crown examined him as to some of the matters to which he had sworn, and then asked him if he had given a different account of the matter when examined upon the coroner's inquest, and when he swore informations before a magistrate? and upon his saying that he had not, they put into his hand his depositions on the inquest, and his informations before the magistrate; upon which the counsel for the prisoners objected, and contended that the counsel for the crown had not a right to examine him to that effect, or to read his depositions or informations to the jury; and the counsel for the crown insisting that they had such a right, the learned Judge permitted them to do so, stating that in the event of a conviction, he would reserve the question for the opinion of the Judges. The examination accordingly continued, and the depositions and informations were

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given in evidence, and appeared to be contradictory to the testimony of the witness; and after further evidence on both sides, all the prisoners were acquitted of murder, and *Moran* and *Macken* were found guilty of manslaughter. The learned Judge did not pronounce any sentence, but entered *curia advisari vult* in the crown book, in order that the opinion of the Judges, whether the conviction was good or not, might be obtained.

TEN JUDGES (*Smith*, B., and *Vandeleur*, J., being absent), were unanimously of opinion that the conviction was wrong, and that the evidence ought not to have been received; that it is not competent to a party who has produced a witness, and had him sworn (unless it were by mistake of his person), even although he had not been asked a question on their part, to discredit him; that it appeared the questions were asked, and the depositions and informations read for this purpose; and that if they were read as proof of the facts therein contained, they were not legal evidence of those facts(*a*).

(*a*) See *Ewer* v. *Ambrose*, 3 B. & C. 746; and *Rex* v. *Oldroyd*, Russ. and Ry. 88.

The KING *v.* JAMES and CATHERINE STAPLETON.

Nov. 12, 1828.

Where husband and wife are both concerned in a highway robbery, the presence of the husband at the commission of the offence is only presumptive evidence of coercion exercised by him over the wife.

Semble, that in a case of highway robbery, coercion by the husband is not a defence for the wife.

The prisoners were indicted for highway robbery, and tried before *Bushe*, C. J., at the Summer Assizes for *Carlow*, in 1828. It appeared in evidence that the prosecutrix, *Mary Quin*, was travelling alone on foot towards *Dublin*, when she was overtaken by the prisoner *Catherine*, whom she did not know, and who accosted her, asking her how far she had to travel, and advised her to secure her money, as the road was dangerous; she asked her how much money she had, and proposed that they should put together their respective monies, and conceal them; upon which the prosecutrix said she had but £2, and that it was well secured in a pocket-book, which, at her request, she showed the prisoner *Catherine*; the latter examined it, and returned it to her after they had travelled some time. The other prisoner, the husband, overtook them, and after a time, left them, and then again joined them; and after some conversation he seized the prosecutrix and knocked her down, and his wife sat down on her head and held her down while both rifled her pockets of all the property in them. The husband then desired his wife to walk on, which she did, taking with her the prosecutrix's bonnet; the husband then attempted to ravish the prosecutrix, and on her resistance beat and bruised her in a cruel manner, and tore off her clothes and threw them about the road. Her screams brought four persons to her assistance, who rescued her and pursued and apprehended the prisoner.

In summing up the evidence, the learned Judge told the

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Jury, that if they believed that the woman acted under the coercion of her husband, they ought to acquit her; and if they believed that she acted voluntarily and without coercion, they ought to find her guilty, if they believed the evidence. The Jury found her guilty, and the learned Judge reserved for the consideration of the Judges the question, whether the conviction of the wife was legal, on two points; First, whether the offence was one in which the coercion of the husband constitutes a defence for the wife. Secondly, if it were, whether the existence of coercion ought not to be inferred from the presence of the husband as a legal conclusion, without leaving any question upon it to the jury.

All the Judges being present, except *Smith*, B., and *Vandeleur*, J., NINE JUDGES held that the question was properly submitted, and that consequently the conviction was right. JOHNSON, J. thought the question was submitted to the jury in a way which might have left them under some mistake as to the nature of the coercion of a husband over a wife in the contemplation of law.

It was not necessary, in consequence of this opinion of the Judges, to decide the first question; but it was much discussed, and authorities were cited and considered. It was the opinion of the majority, that a wife is not entitled to the benefit of the principle of coercion of the husband in a case of robbery; but although this was their opinion, they did not decide the question.

IN the matter of the appointment of a LOCAL INSPECTOR to CAVAN GAOL.

January 23, 1829.

The Judge of Assize has a discretion to withhold his approbation to the appointment by the Grand Jury of a new Inspector of a County Gaol under the 7 Geo. IV, c. 74.

By the 7th Geo. IV. chap. 74, sec. 65, (the general Gaol act), it is enacted,---"That it shall and may be lawful for "each and every Grand Jury of every county, county of "a city, and county of a town in *Ireland*, with the consent "and approbation of the Court or Judge at each assizes "and in each presenting Term, from time to time, to appoint "a local inspector for such county, &c. respectively (such "Inspector to be removable by the Grand Jury of such "county, &c. &c., with the approbation of the next going "Judge of assize) to regulate, under the Board of super-"intendance appointed under this act, the procuring and "providing of Food and necessaries for the prisoners in the "Gaol, &c."

Previous to the Summer Assizes in 1828, it being known that a vacancy in the office of Local Inspector of the Gaol of *Cavan* would take place at those assizes, a brother of the High Sheriff of the county declared himself a candidate for the office, and by letters solicited the gentlemen of the county who were usually called to serve on the Grand Jury, to support him by their votes at the next assizes. Some of the gentlemen of the county, in reply, promised him their support; others informed him that they would reserve their decision until they had an opportunity of discussing the merits of the respective candidates, and others denied him their support altogether. After the Grand Jury had been sworn, it was intimated to *Torrens*, J., the Judge of Assize, by several of its most respectable mem-

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bers, that gentlemen of considerable fortune and station in the county, who were in attendance in the Grand Jury box to be sworn on the Grand Jury, if called, and who were usually on former Grand Juries, had been passed by because their opinions were adverse to the election of the High Sheriff's brother to the office of Inspector; and the learned Judge was referred to former grand panels as evidence of their almost uniform service on former Grand Juries, whenever they were in attendance. It was also represented to him that such of the Grand Jurors as were hostile to the pretensions of the candidate in question, or who declined pledging themselves, were called much lower down on the panel than their rank and fortune, and position on former Grand Juries, warranted; and that thus had the persons called in the commencement of the panel answered to their names, the others would have been left off the Jury altogether. The learned Judge was referred to a comparison of this panel with former ones as to this fact, and also as to the fact that persons in immediate connexion and relationship with the High Sheriff and the candidate were placed much higher on the panel than usual, or their pretensions warranted; one of those persons so pointed out was another brother of the High Sheriff, whose name stood high in the Grand Jury list.

Upon the vacancy having taken place, towards the conclusion of the Assizes, the Sheriff's brother and another person were proposed as candidates, and the former was elected by the Grand Jury by a majority of three; the result of the election was announced to the learned Judge in open court.

It being evident during the Assizes that great dissatisfac-

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tion prevailed amongst the leading gentlemen of the county as to the manner in which the Grand Jury had been formed, and that the Grand Jury had been modelled in consequence of the answers given during the canvass; the learned Judge did not consider himself bound to give his "consent and approbation" to the appointment of the elected candidate, considering it right that the opinion of another Grand Jury, not summoned under such circumstances as the present, should be taken upon the appointment. His lordship therefore refused to fiat the presentment; reserving for the decision of the Judges the question, whether the statute gives the Judge who presides in the criminal court, the power of refusing his consent and approbation to the Grand Jury appointment, under such circumstances as above stated; the board of superintendance being instructed to appoint an inspector *ad interim*, until the decision of the Judges should be given.

ALL THE JUDGES (except *Smith*, B., and *M'Clelland*, B.,) being present, unanimously decided that the Judge had a discretion to withhold his concurrence.

IN the matter of PRESENTMENTS for the Clerk of the Crown and Sheriffs upon an ADMIRALTY COMMISSION.

Jan. 23, 1829.

A commission to the going Judge of Assize, for the trial of Admiralty offences, under the 23 & 24 Geo. III chap. 14, sec. 4, is not a *special commission* within the meaning of the 4 Geo. IV. c. 43, sec. 3. (6 & 7 Wm. IV, c. 116, s. 113.)

PREVIOUS to the Summer Assizes for the city of *Cork* in 1828, a commission issued, directed to *O'Grady*, C. B.,

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and *Pennefather*, B., (the then going Judges of Assize for the Munster Circuit), Sir Jonah *Barrington*, Judge of the Admiralty, and others of his Majesty's counsel, requiring them, or any two of them, to hear and determine all offences committed on the high seas, and to deliver the gaol of the city of *Cork* of all prisoners committed for such offences. This commission required the Judges in the usual way to issue their precept, &c., and it was dated after the ordinary circuit commission. It was issued by virtue of the 23 and 24 Geo. III, chap. 14, sec. 4. and was delivered to *O'Grady*, C. B., and *Pennefather*, B.

Under this commission a precept was issued (separate and distinct from the general Assizes' precept), to the Sheriffs of the city of *Cork*; this precept was duly returned, a Grand Jury (which in point of fact consisted of the same persons as those returned for the Assizes) sworn, and a trial for murder had; the two Judges sitting together agreeably to the provisions of the act and the tenor of the commission. It was thus a separate and distinct commission from the general Assize commission.

At the close of the Assizes, the Clerk of the Crown and the Sheriffs submitted to *Pennefather*, B., who presided in the Crown Court of the city of *Cork*, that this was a special commission, and that under the provisions of the act 4 Geo. IV, chap. 43, sec. 3,(*a*) which enacted, that "in "any county where a special commission or adjourned "Assize shall be held for the trial of offenders, the several "Grand Juries shall at the Assizes next immediately

(*a*) The 6 & 7 Wm. IV, c. 116, s. 113, is the corresponding enactment now in force. By it the additional presentment is not to exceed *one-fourth* of the salary.

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" ensuing, subject to the provisions of that act, make a fur- " ther presentment for the Clerks of the Crown, Sheriffs, " and Judges' Crier, equal to one-half of the salary of such " officer," they were entitled to presentments equal to half of their salaries under that act, and that the Grand Jury should be required to make such presentments. Presentments were accordingly made by the Grand Jury, upon an understanding that they should be respited until the next assizes, which was done, in order that the opinion of the Judges might be taken, whether under the foregoing circumstances these presentments ought to have been made, and should be fiated by the next going Judges of Assize.

ALL THE JUDGES (except *Smith*, B., and *M'Clelland*, B.,) being present, unanimously decided against the presentment.

THE KING *v.* JAMES M'KEARNEY.

May 20, 1829.

The getting the head out through a skylight is a sufficient breaking out of a house to constitute burglary.

THE prisoner was tried before *M'Clelland*, B. at the Spring Assizes at *Omagh* in 1829, on an indictment for a burglary in the house of *Louis Davis*. There were three counts in the indictment; the first for breaking and entering the house by night with intent to steal, &c.;—the second for entering the house with intent to steal, &c., and breaking said house by night, and getting out of the same;—the third for entering said house with intent to steal, &c., and by night breaking out of said house.

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It appeared on the trial that on the 8th of January 1829, the prisoner was, about 11 o'clock at night, discovered in the cellar of the house hid under a heap of potatoes; he fled from the cellar into a room in the house and locked himself in; this room had a shed roof and a sky-light in the roof. *Davis*, the owner of the house, heard the sky-light breaking, and then ran round into his yard, when he saw the prisoner with his head out of the sky-light endeavouring to escape,—he struck the prisoner a blow on the head, when he fell down into the room, where he was taken by a police constable immediately after, on his breaking open the door which the prisoner had locked. The Jury convicted the prisoner, but the learned Baron entertaining some doubts whether there was a sufficient breaking out of the house to constitute the crime of burglary, reserved the following question for the twelve Judges: Whether, the prisoner having only got his head out of the sky-light, this was a sufficient breaking out of the house to complete the crime of burglary?

THE JUDGES unanimously ruled that the conviction was right.

IN the Matter of a PRESENTMENT to the Clerk of the Peace of the County TIPPERARY for Printing Election Notices.

Nov. 11, 1829.

AT the Summer Assizes for the County of Tipperary in 1829, the clerk of the peace required the grand jury to present the sum of £1049 18*s.* 8*d.* to be levied off the county and paid to him, as being the amount of sums he had actually disbursed for the expenses of printing the notices and advertisements directed by the statute 10 G. IV. c. 8; and he made an affidavit stating that he had made himself liable for that sum, having employed the editors of three newspapers in the county to print and publish those notices and advertisements, and had undertaken the payment thereof; and he urged, that the above sum was to be considered a "necessary disbursement" under the 37th section of the statute.

Held, that the Grand Jury had a power of considering what is a "necessary disbursement" by the clerk of the peace, under the 10 Geo. IV, c. 8, s. 37, for printing election notices, &c.; and that that statute was not mandatory on them to present the sum actually disbursed.

The grand jury objected to the amount, alleging that they were only bound to present all such sums as were necessarily disbursed, and that they considered that it was unnecessary to disburse so large a sum for the purpose; and that if by the legal construction of the words of the section, they had any power of considering what should be deemed a necessary disbursement, it was their opinion, after due investigation of the charges, that the sum of £500 was sufficient.

The clerk of the peace insisted on the full amount, contending that the statute was mandatory on the grand jury to present it; and the grand jury having persevered in a contrary opinion, *Moore*, J., (the Judge of Assize) directed

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TIPPERARY PRESENTMENT.

them to make a presentment in both ways, stating, that on obtaining the opinion of the Judges, he should fiat that one which came within the legal construction of the statute.

ELEVEN JUDGES (*Smith*, B., being absent) decided unanimously against the claim of the clerk of the peace, and directed that the presentment for £500 should be fiated(*a*).

(*a*) The 6 & 7 W. 4, c. 116, s. 115, provides, that the grand jury may present "such sums *as may be necessary*, to defray the expense of "providing and printing registry books and lists," &c. required by the election laws.

Nov. 11, 1829.

IN the Matter of a PRESENTMENT for the County WICKLOW INFIRMARY.

A presentment cannot be made after the assizes, *nunc pro tunc*, where the grand jury had, by oversight, omitted to take any steps respecting it at the assizes.

BY the 5 Geo. III. c. 20, s. 6, the grand jury were empowered to present £100 per annum for the use of the county infirmary; and by the 45 Geo. III. c. 111, s. 1, they were empowered to present a further sum of £500 to the governor and governesses of such county infirmary for the like purpose.

The grand jury of the County of *Wicklow* had, since the passing of the last-mentioned Act, invariably presented, at the Summer Assizes, a sum of £600, late currency, for the support of the infirmary. It was not the habit to enter that presentment on the schedule, nor were any documents ever laid before the jury; but on the second day of the assizes, it was usually entered with the officers' salaries and county incidents in the salary book, and signed by the foreman as a matter of course.

1829.

WICKLOW INFIRMARY.

At the Summer Assizes for *Wicklow* in 1829, the presentment for the year was, by an omission, not signed by the foreman, nor submitted to the grand jury, nor brought under the consideration of the Court. In the month of October it was first discovered that the presentment had been altogether omitted at the assizes, and an application was made to *Moore*, J. (the Judge of Assize), by the foreman of the grand Jury and others, to fiat the presentment "*nunc pro tunc*," upon an undertaking to procure the signatures of the several grand jurors to it; which was done, with the exception of two or three who had left the country.

The opinion of the Judges was desired, whether this presentment could then be made, and the amount included in the general levy warrant.

ELEVEN JUDGES (*Smith*, B., being absent) decided this question unanimously in the negative(*a*).

(*a*) The provisions of the particular Acts, upon which this question arose, appear (as far as making the presentment is concerned) to be superseded by the 6 & 7 W. 4, c. 116, s. 85, which provides for the maintenance of county infirmaries.

THE KING *v.* BARRETT, CONNORS, and Two Others.

Nov. 18, 1829.

Where on a trial at a special commission, the jury could not agree, and after remaining a long time shut up were discharged by the court (no consent being given by the counsel on either side), in consequence of the physician's report that a longer confinement would endanger the lives of some of them; *Held*, that they were properly so discharged, and that the prisoners were triable again; and that they might have been tried at the same commission, if the judge had thought proper.

AT the special commission for the County of *Cork* in 1829, the prisoners were capitally indicted before *Pennefather* B., and *Torrens*, J., for the crime of con-

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spiracy to murder. Their trial came on on Monday the 26th of October, at about nine o'clock in the morning, and the jury retired about eleven o'clock on that night. At two o'clock on the following morning they agreed to acquit *Barrett*, and a verdict of not guilty was recorded as to him; but not agreeing as to the other prisoners, they were locked up for the night and very strictly kept. At ten o'clock on Tuesday the Judges returned to Court, and the jury were called out. They said they had not agreed, and that although they had canvassed the case over and over again, it was impossible they could agree: they were then sent back to their room, and kept as strictly as before; and not having agreed at two o'clock, the Court was adjourned. At six o'clock in the evening the Judges returned; the opinions of the jurors remained as before, but many of them complained of illness; and one of them, whose name was *Allen*, was severely attacked by gout in the foot. Two physicians were then procured and duly sworn—the juryman was likewise sworn to answer them truly, and they were sent into the jury room. They then examined the jurors, and especially *Allen*. They said that three of the jurors besides *Allen* were ill, and that he was in such a state that he could not be confined another night without danger to his life, in a room without fire or food. They said, however, that there would not be much risk in his remaining until ten o'clock. At ten o'clock (the jury in the mean time having been remanded to their chamber) the Judges returned to Court, counsel for the Crown and for the prisoners attending. The same disagreement still subsisting among the jury, the physicians were again directed to examine them, which they did, and reported that the gout had considerably increased in Mr. *Allen*, and that he could not

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remain for the night without risk to his life. Others of the jury complained very much, and they all said that they had remained for above fifteen hours without any change of opinion, and that it was impossible they could agree. Counsel for the prisoners objected to the discharge of the jury, but said they would consent to their getting refreshment. This the Court declined to accede to, and called the attention of the Solicitor-General and the other counsel for the Crown to the course about to be adopted, namely, that of discharging the jury. The Solicitor-General replied, that they would not interfere or give any consent, but that the course about to be adopted met their full concurrence; and thereupon the Court thinking that the risk of the juror's life ought not to be incurred, ordered the jury to be discharged, and they were discharged accordingly.

On the following day the Solicitor-General proposed to put the prisoners *Connors* and the other two prisoners again on their trial. To this their counsel objected, insisting, first, that the jury had been improperly discharged, and that the prisoners should have the benefit of the mistake, and could not be tried again; but, secondly, that, at all events, in analogy to the case where a jury is discharged at the assizes, the prisoner ought not to be tried until the next gaol delivery. After some argument, the Court inclining to postpone the trial to the next gaol delivery, the Solicitor-General acceded to this being done. The trial was postponed, the prisoners remaining in custody; and the Court referred the following questions for the opinion of the Judges :---

1st, Were the jury under the circumstances properly

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discharged, and could the prisoners be tried again? it being borne in mind that the duration of the commission was indefinite, and that it might have been prolonged to any number of days or weeks.

2ndly, Supposing that the prisoners were properly triable again, would it have been objectionable to have tried them at the same commission?

THE TWELVE JUDGES were unanimously of opinion, that the jury were properly discharged, and that the prisoners were triable again at the same commission, if the Judge had thought proper to try them(*a*).

(*a*) See Rex *v.* Edwards, 3 Camp. 207; Russ. & R. 224, S. C.

Nov. 18, 1829.

THE KING *v.* DANIEL DELANY & PATRICK CHEEVERS.

Where the judge took it upon himself to discharge the jury, in consequence of a statement upon oath by one of the jurors (without the examination of a medical man) that his life would be endangered by a longer confinement, and to remand the prisoner; *Held*, that the judge had acted rightly, and that the prisoner was not entitled to be discharged.

THE prisoners were tried before *Bushe*, C. J., at the Summer Assizes for the *Queen's County*, in 1829, upon an indictment charging a capital felony, under the Whiteboy Act(*a*). The trial began at 10 o'clock A. M., on the 31st of July, and at half-past 5 the jury retired to consider their verdict. The learned Chief Justice left the Court at 7, P. M., and returned at 11 o'clock at night, when the jury being called out informed him that they had agreed as to one of the prisoners, but could not agree as to the other; on which they returned to the jury room. The Chief Justice again left the Court, and returned at

(*a*) 15 & 16 G. 3, c. 21.

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10 the next morning, the 1st of August, when the jury, being called out, stated the same thing that they had the night before; whereupon by the consent of the prisoners, and of the counsel for the Crown, his Lordship received and recorded the verdict which they were ready to give, which was an acquittal of the prisoner *Cheevers*. His Lordship was then about to remand the jury, when they informed him that it was impossible that they could agree; and one of them, Mr. *John Campion*, having stated that his life would be endangered by further confinement, the Chief Justice had him sworn and examined on oath; and he swore, that he was an aged man, far advanced in years, and had lately had a severe sickness, from which he was not quite recovered, and that he had suffered so much from pain in the night, that he felt his mind and body both unequal to the discharge of his duty in the case, and was sure that his life was in danger. Upon this his Lordship charged the jury, and remanded the prisoner *Delany*.—On the 4th of August, being the first day of the assizes at *Philipstown*, whither Lord *Plunket*, C. J. C. Pleas (the other Judge of Assize), had gone on before, the counsel for the Crown, at half-past two, P. M., called on *Bushe*, C. J., to bring on again the trial of *Delany*, in whose case the jury had been discharged. *Bushe*, C. J., asked the prisoner's counsel if he was ready for his trial, and they stated that he was not, but that they considered him entitled to be discharged, inasmuch as the Court was not authorized to discharge the jury merely on the oath of one of the jurors, without the examination of a medical man as to the state of that juror's health; and moved that he should be discharged, which his Lordship refused to allow. At the time the jury were discharged, neither the prisoner, nor his counsel, or attorney, who were in Court, made any

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objection; but they were not called on to say whether they consented. Under these circumstances, the learned Chief Justice reserved the question, whether the prisoner *Delany* was entitled to be discharged.

THE TWELVE JUDGES were unanimously of opinion, that the Judge had a discretion to discharge the jury under the circumstances above stated, and to remand the prisoner; and that this discretion had been soundly exercised in the present case.

May 12, 1830.

THE KING *v.* PHILIP NOONAN, and Others.

On a conviction for administering an unlawful oath, the prisoner may be sentenced to hard labour and imprisonment, by virtue of the 51 G. 3, c. 63, s. 2.

Quære, whether to support an indictment under the 50 G. 3, c. 102, s. 1, for administering an unlawful oath, it must be proved that the countrywas in a state of disturbance?

AT the Spring Assizes for the Co. of *Galway*, in 1830, *Philip Noonan* and *Michael Noonan*, were, together with others, tried before *Smith*, B., on three indictments:---1st, for a riot; 2ndly, for appearing armed by night; and 3rdly, for administering an unlawful oath. The latter indictment was as follows:---"The jurors for our Lord the King upon "their oath do say and present, that *Philip Noonan* and "*Michael Noonan* &c., in the said county, labourers, "being evil disposed persons and disturbers of the peace "of our said Lord the King, and not regarding the laws "and statutes of Ireland, nor they, nor any, or either of "them, being duly qualified by law to administer an oath, "on the 16th day of October in the 10th year of the "reign of our Sovereign Lord George IV., &c. with "force and arms, at *Gurtymadden*, in the County of "*Galway* aforesaid, wilfully, maliciously, contemptuously, "unlawfully, and feloniously, did administer, and cause "to be administered, to one *Thomas Bourke*, a true and

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"faithful subject of our said Lord the King, a certain "oath then and there accordingly taken by the said "*Thomas Bourke*, importing and then and there intended "to bind him, the said *Thomas Bourke*, the person then "and there taking the same, not to prosecute or give "evidence against certain persons for certain illegal "acts(*a*) done by them against the peace of our said "Lord the King, his crown and dignity, and contrary "to the form of the statute in that case made and pro-"vided." The jury found all guilty on the first indictment: they found *Philip Noonan* and *Michael Noonan* guilty on the third; and on the second they acquitted all, on the ground of its not appearing to them, that at the time of the offence there were illegal confederacies or associations on foot, or that the neighbourhood was in a state of disturbance.

The three indictments were founded upon one and the same transaction, which occurred on the 16th of October, 1829. The evidence in support of the third indictment was, that the prosecutor did not know who administered the oath, but that *Philip Noonan* and *Michael Noonan* were present, and within hearing. The oath was, "never to prosecute." The learned Baron told the jury, that if they believed *Philip* and *Michael Noonan* to have been aiding and assisting, the indictment was supported. The jury strongly recommended the prisoners to mercy, on account of a good character which was given them by respectable witnesses, and of their state of health; and to this recommendation the learned Baron was disposed to attend, but on looking into the statute 27 Geo. III. c. 15,

(*a*) *Quære*, whether this is a sufficient description of the "purport or object" of the oath.—See 50 G. 3, c. 102, s. 4; and 27 G. 3, c. 15, s. 7.

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(on which he considered that the indictment was founded) a doubt occurred to him as to whether the punishment was discretionary; or whether the statute should be considered as prescribing a sentence of transportation for the convicts' life. After conferring with *Burton*, J., it was agreed, that the case should be reserved for the consideration of the Judges. The learned Baron accordingly pronounced no sentence. Upon submitting the case to the Judges, the learned Baron suggested, that if the third indictment was to be considered as supported by the 50 Geo. III., then it seemed that the sentence must be transportation for the convicts' life; but that on the construction of that statute, a doubt might arise, as to whether, towards bringing it into operation, there must not exist illegal confederacy, and the oath, perhaps, be connected with the existence of such confederacy. The verdict on the second indictment, and the grounds of it, negatived the existence of such a state of things, and disconnected the transaction, on which alone the several indictments were founded, from illegal confederacy and combination. But if the third indictment were founded on the 27 Geo. III., it did not seem that the existence of any illegal association was requisite to support the verdict: and the question in this latter case would be, whether the sentence was discretionary, or must be transportation for the convicts' life.

THE JUDGES, without directly deciding the questions proposed, gave their opinion, that this was a case in which the 51 Geo. III. c. 63, s. 2, authorizing a sentence of hard labour and imprisonment, might be acted upon.

IN the matter of a PRESENTMENT to the Clerk of the Peace in the Co. MONAGHAN, for registering Arms.

Trim Tern. 1830.

A presentment to the clerk of the peace for his trouble in registering Arms under the 47 Geo. 3, c. 54 (revived by 10 Geo. 4, c. 47), *Held* to be illegal, by force of the 4 Geo. 4, c. 43, s. 1. (6 and 7 Wm. 4, c. 116, s. 110.)

AT the Spring Assizes for the County *Monaghan* in 1830, the Grand Jury made the following presentment,—"We "present to *Robert Smith*, Esq. the sum of £9 4*s.* 7*d.* for "his trouble in the execution of his duty in registering "arms pursuant to the 47 Geo. III, c. 54, revived by the "10 Geo. IV, c. 47."

The statute 47 Geo. III, c. 54, s. 47, enacted that it should be lawful for Grand Juries at each Assizes, and they were thereby required, to present such sum to be raised off the County as might be required to reward the clerks of the peace for their trouble in executing the act, not exceeding ten pounds at any one Assizes. This Act was continued and amended by the 50 Geo. III, c. 109, and was again continued, as so amended, by the 53 Geo. III, c. 78, and afterwards by the 57 Geo. III, c. 21. It was afterwards *revived* and *continued* by the 1 Geo. IV, c. 47, and further continued for two years from the end of the then session of parliament, and from the expiration of such five years until the end of the then next session of parliament. The last mentioned statute was passed on the 24th of March, 1823, so that it continued the Arms Act, viz. the 47 Geo. III, to the end of the session of the year 1829; and on the 19th of June, 1829, by the 10 Geo. IV, c. 47, the Acts 47 and 58 Geo. III. were continued for one year from the passing of the Act until the end of the then next session of parliament. On the 27th of June, 1823, the

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PRESENTMENT FOR REGISTERING ARMS.

Act (4 Geo. IV, c. 43,) to regulate the payment of the public officers of counties passed, whereby it was enacted (s. 1,) that all clerks of the crown, clerks of the peace, and all other officers and persons for the payment and remuneration of whose duties, salaries, or expenses, any presentment is required to be made, under any Act or Acts in force at the time of the passing of that Act, should be paid by annual salaries only; and it declared it to be unlawful for any Grand Jury in any case to present any sum or sums for any such officer, other than the salary set forth in the table to the statute.

The Acts of 47 and 50 Geo. III. having been in force at the time of the passing of the 4 Geo. IV, c. 43, *Moore*, J., (the Judge of Assize,) conceived that the clerk of the peace was precluded from claiming fees for registering arms pursuant to the statutes. As however the clerk of the peace insisted upon his right to the sum presented by the Grand Jury, the learned Judge reserved the case for the opinion of the Judges.

THE JUDGES were unanimous against the presentment.(*a*)

(*a*) The acts regulating the registry of arms, mentioned in this case, have been (as amended by the 1 & 2 Wm. IV, c. 47,) continued by a succession of acts, the last of which is the 3 & 4 Vic. c. 32, continuing them for one year, and from thence to the end of the next session.—The 110th section of the 6 & 7 Wm. IV, c. 116, corresponds with the 4 Geo. IV, c. 43, s. 1.

THE KING *v.* TERENCE CUSHLAN.

July 3, 1830.

Where the prisoner was present at a sale of goods by the prosecutor to a third person (who was introduced by the prisoner to the prosecutor as a purchaser,) and took up a Bank Note given by that person in payment, saying that it was good, and that he would make it good; and desired the prosecutor to write his (prisoner's) name upon it:—The note proving a forgery, *Held* that there was a sufficient evidence of *uttering* by the prisoner.

At the Spring Assizes for the County of *Monaghan*, in 1830, before *Moore*, J., *Terence Cushlan* was indicted, first, for feloniously uttering a forged note of the Bank of Ireland; secondly, for having in his possession such note knowing it to have been forged; and thirdly, for passing a base half-crown.

The evidence to support these charges was as follows: *Bernard M'Mahon* being examined, said, that a man named *Hannigan* had a cow to sell at the fair of *Drum;* the prisoner and two other men were bargaining for her, and they agreed for the price of two pounds; they went into a public house to pay the money; witness did not go in; they came out again together, and *Hannigan* said in their presence that he had been paid for his cow, and that he had treated the men to drink; the prisoner said that was the fourth cow they had bought in that fair. One of the three men called himself *Elwin*, and was so called by the prisoner; it afterwards appeared that his real name was *Brown*.

Hannigan, the owner of the cow, being sworn and examined, said, that having met the prisoner in the fair, witness asked him to buy the cow, as he had known him buy cows before; he said he was out of the habit of buying cows, but he would get him a chap; and he went away, and returned with the other two men. *Brown*, who went then by the name of *Elwin*, asked the price; witness said, two pounds ten shillings; the prisoner said two pounds

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would be a fair price, and he would allow no more. They agreed, and the prisoner told *Brown* (then called *Elwin*) to pay witness speedily, as he had a bad road to go home; witness received in payment a Bank of Ireland note for £1 10*s.* 0*d.*, and ten shillings in change. It was *Brown* (who gave his name as *Elwin*) that laid the money down before witness on the table, and appeared to be the owner of it. The prisoner took up the note, and said it was good, and that he would make it good, but that he could not write, and desired witness to write his (the prisoner's) name on it after *Elwin's*, which he did. This took place on *Tuesday*, and on the *Saturday* after he found the note was bad; he then went to the prisoner (who had promised to find *Elwin* for him, and him for *Elwin*, if any thing was wrong on either side), but he gave him an evasive answer; witness then asked the prisoner who the third person was; he told him his name was *John Finny*, and also told him where he lived, but witness could never find him at home.

Mr. *Cooke*, from the Bank, proved the note to be a forgery, and half-a-crown, part of the ten shillings, to be base coin.

The Jury found the prisoner guilty of the uttering under the first indictment, and acquitted him of the charges in the other two; and the actual possession of the note by the prisoner being negatived by this finding, the learned Judge reserved for the consideration of the twelve Judges the question, whether on the evidence there was such a constructive possession of the note by the prisoner as would support the capital indictment for uttering; it appearing that *Brown*, who was called *Elwin*, had in fact the possession, and delivered it in payment in the first instance.

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Eight Judges being present, six of them (O'GRADY, C. B., LORD PLUNKET, C. J. C. Pleas, BURTON, J., VANDELEUR, J., JOHNSON, J., and PENNEFATHER, B.,) held that the conviction was right. BUSHE, C. J., and MOORE, J., held that it was bad.

THE KING *v.* ANNE WOODS.

July 3, 1830.

AT the Spring Assizes for the County of *Antrim* in 1830, *Anne Woods* was indicted and tried before *Moore*, J., on an indictment for feloniously uttering a forged promissory note for the payment of money, purporting to have been made on behalf of the court of Directors of the Royal Bank of *Scotland*, for one guinea, dated 4th Nov. 1826, with intent to defraud, &c.

Held that a prisoner might be convicted of uttering a forged instrument, although the instrument when given in evidence was so mutilated that it could not be decyphered without the aid of a *fac simile*.

It appeared in evidence that the prisoner passed the note in question in a shop in *Belfast*, in payment of a few shillings' worth of goods. The note being considered bad, and the police having been sent for, the prisoner asked to be allowed to see it, and when produced, she snapped at it and put it in her mouth; the officers forced it out of her mouth, and it was broken in two pieces. On the note being produced in court, it was lacerated and deficient in several particulars, as was proved by Mr. *Archibald Bonner*, who signed the notes of the Royal Bank of *Scotland*. This witness, after stating his signature to be a forgery, and that the note purported to be for one guinea(*a*), said, that the

(*a*) The note had contained these words and figures—"Edinburgh, 4th "Nov. 1826. One Guinea. Number $\frac{2}{44}\frac{1}{7}\frac{2}{7}$. The Royal Bank of Scotland "promise to pay *Andrew Boyle*, or the bearer, One Guinea on demand, at "their office here. By order of the Court of Directors, James Moore, "P. Acct., Arch. Bonner, P. Cashier."

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word "guinea" in the body of the note was entirely gone, except the G and half the letter U; that the words "office here" were wanting after the word "their," that after the word "order" half the letter f in the word "of" was wanting, that the word "court" was wanting altogether, that the three last letters in the word "Directors" were wanting, that in the word "account" the letters "ac" were wanting, that the P after witness's signature (which stood for *pro*) and also the two first letters of the word "Cashier" were wanting. He said further that the practice was to number the notes diagonally at two of the corners, and that the number (212) was wanting on one of the corners, and that in fact the note could not be decyphered without the aid of a *fac-simile*.

The learned Judge left the case on this evidence to the Jury, who found the prisoner guilty, on the understanding that the opinion of the Judges should be taken, whether the instrument so mutilated was sufficient in point of law to sustain the indictment.

EIGHT JUDGES (BUSHE, C.J., LORDPLUNKET, C.J. C. Pleas, O'GRADY, C. B., MOORE, J., JOHNSON, J., BURTON J., PENNEFATHER, B. and VANDELEUR, J.) having met, were unanimously of opinion that the conviction was right. A *fac-simile* of the note was produced by MOORE, J., at the meeting.

IN the matter of a PRESENTMENT for a COURT HOUSE in the Co. of CORK.

April 27, 1831.

A traverse does not lie to a presentment for a new County Court House duly made according to the 53 G. III, c. 131.

THE Grand Jury of the County of *Cork*, at the Spring Assizes in 1831, made a presentment for building a new Court House upon a plot of ground specified in the presentment; and to this presentment a traverse was tendered on behalf of some landholders of the county, principally on the ground of an objection to the site.

Jebb, J., before whom the presentment was made, having examined the presentment, and compared it with the statute 53 Geo. III, chap. 131, found it to correspond therewith in every particular; and his opinion was that a traverse to such a presentment did not lie. At the solicitation of counsel, however, he reserved the point for the consideration of the Judges; and the question accordingly was, whether a traverse lies to a presentment for a new county Court House, duly made according to the statute 53 Geo. III, chap. 131, and the other statutes on the subject?

The TWELVE JUDGES unanimously decided against the right to traverse in this case(*a*).

(*a*) The regulations of the 53 G. III. c. 131, seem to be still in force, subject to s. 69, and the following sections, of 6 & 7 Wm. IV, chap. 116. See also 2 & 3 Vic. chap. 50, s. 11.

Nov. 30, 1831.

THE KING *v.* JOHN M'DERMOD and PATRICK M'GANN.

A notice posted in a public place, and in the following terms: "Mr. B., take "notice that "Terry and "his men will "pay you a "visit in ten "days. I "would re- "commend the "Geraghtys "of Killigenan "to lower the "con-acre "rent, or I "will write to "his Excel- "lency;" signed "Terry "and his mo- "ther," is not in itself a notice tending to excite a *riot* or *tumultuous meeting* or an *unlawful combination or confederacy* under 27 G. III, c. 15, s. 9.

At the Summer Assizes for the County of *Galway* in 1831, *John M'Dermod* and *Patrick M'Gann* were tried before *Burton*, J., on an indictment grounded on the 27 G. III, c. 15, s. 9, by which it is enacted, "That if any person "shall print, write, post, publish, or knowingly circulate, "or deliver, or shall cause or procure to be printed, "written, posted, published, circulated, or delivered, any "notice, letter, or message, exciting, or tending to excite "any riot, tumultuous meeting, or unlawful combination "or confederacy; every such person being by due course "of law thereof convicted, shall be adjudged a felon, and "suffer death as in cases of felony without benefit of "clergy."

The first count of the indictment charged the prisoners with having on the 23rd of April, in the first year of the present King, at *Mount Bellew Bridge*, feloniously posted a certain notice tending to excite a riot, which notice was set out in the indictment, and was as follows: "Mr. Brittan, take notice that Terry and his M——(torn) "will pay you a visit in ten days. I would recomm—— "(torn) the Geraghtys of Killigenan to lower the con- "acre rent, or I will write to his Excellency."

"Terry and his Mother,"

"&c., &c., &c."

Another count stated the tendency of the notice to be "to excite an unlawful combination and confederacy," and another "to excite a tumultuous meeting," and two other

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counts varied the description of the notice by supplying the letters supposed to be torn off. A notice was produced which was exactly as described in the first count of the indictment, and was proved to have been posted by the prisoners (who were watched and observed by the witnesses in the act) at four o'clock in the morning of the day specified in the indictment, on a milestone, which was on the battlements of the bridge at *Mount Bellew*. It was also proved that about that time many threatening notices were posted in that part of the country, but no other evidence was given of public disturbance.—On the part of the prisoners it was suggested that the notice was not in its terms such a notice as is described or contemplated by the statute. On the part of the crown it was desired that the case should be left to the Jury, and that in case of a conviction, the question should be reserved for the consideration of the Judges. It was accordingly left to the Jury to consider whether the notice was posted with the intention and had a tendency to excite any or either of the consequences specified in the indictment. The Jury found the prisoners guilty, and *Burton*, J., respited the judgment until the opinion of the Judges upon the question should be obtained.

ELEVEN JUDGES being present (*Torrens*, J. absent), all except FOSTER, B., were of opinion that the evidence ought not to have been left to the Jury, and that the conviction was wrong.

Nov. 30, 1831.

THE KING *v.* ROBERT M'CUE.

The receiver of a stolen promissory note was indicted for a substantive felony under the 9 G. IV. c. 55, s. 47, and a witness for the Crown proved that he (witness) had stolen the note; but it appeared on his cross-examination that he had been tried for the larceny and acquitted, a fact of which the Judge had judicial knowledge. *Held*, that the acquittal of the principal was not conclusive evidence of his innocence, but that the Judge was right in leaving to the Jury the fact of the acquittal together with the witness's averment of the theft.

THE prisoner was tried at the City Sessions Court on the 26th of July, 1831, before *Frederick Shaw*, Esq., Recorder of *Dublin*, on an indictment as for a "substantive felony" under the 9 Geo. IV, c. 55, s. 47, for having received a promissory note of the Bank of *Ireland* for £100, the property of *Robert Dudley*, and which was stated in the indictment to have been stolen by *Patrick Curran* and others. *Patrick Curran* was produced as a witness upon the trial to prove the larceny by himself and the other persons named in the indictment. Upon his cross-examination he admitted that he and those persons had been previously tried for the stealing of the note, and acquitted. The learned Recorder was aware that the fact was so, as their trial took place before him; and he saved the point without requiring the record of acquittal to be made up. Counsel for the prisoner contended that the acquittal of the principals was conclusive of their innocence, and that upon that ground the Jury in the present case should be directed to acquit the prisoner. The learned Recorder, however, told the Jury to consider the fact of the acquittal of the principals together with the other evidence which had reference to the averment of their having stolen the note, and that if they were not upon the whole satisfied of the guilt of the principals, they should acquit the prisoner; but that if they came to the conclusion that the individuals charged as principals had in point of fact stolen the note, and that the prisoner had received it, knowing it to have been stolen, then they should find him guilty. The Jury without hesitation returned a verdict of guilty, and the prisoner (being an old offender) was sentenced to 7 years

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transportation: but execution of the sentence was stayed in order to obtain the opinion of the Judges on the propriety of the conviction under the circumstances above stated.

The prisoner's counsel referred to 2 Hale, P. C., Book 2, c. 29, s. 36; and to Foster's Crown Law, pp. 343 & 345 (Dublin edition, 1791), Discourse 3, c. 1, s. 1.—The learned Recorder referred the Judges to the cases of the *King* v. *Smith*, 1 Leach 288, and the *King* v. *Bush*, Russ. & Ry. 372, as bearing, in principle, upon the present case.

ELEVEN JUDGES (*Torrens*, J. being absent) unanimously held that the conviction was right.

THE KING *v.* WILLIAM STONAGE.

January 18, 1832.

An exemplification of the sentence of degradation under the Episcopal seal is not necessary evidence to support an indictment against a person alleged to be a degraded clergyman, for celebrating a marriage between Protestants.

AT the Summer Assizes for the county of *Donegal*, in 1831, *William Stonage* was tried before *Moore*, J., on an indictment which charged that he being a degraded clergyman, on the 4th of February, 1 Wm. IV, unlawfully and feloniously did celebrate a marriage between one *William Preston* and one *Elizabeth Baldricke*, they being Protestants, against peace and statute(*a*). A question was reserved for the consideration of the Judges with respect to the legality of the evidence adduced to sustain the averment that the prisoner was at the time a degraded clergyman, which was as follows:

(*a*) 12 Geo. I. c. 3.

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Richard Babington, one of the deputy registrars of the diocese of *Derry*, said that it was his duty to keep a list of the clergy of the diocese and of all the proceedings in the Diocesan Court; he produced that list and certain proceedings, and read from them that the prisoner had been a very old licensed curate in the diocese; that in October 1828 he was cited to answer a charge for having celebrated marriage clandestinely, not having a faculty to celebrate marriage, to which citation he appeared in person; that he was afterwards cited to hear sentence, to which citation he also appeared; and that upon the 29th of August, 1829, sentence, whereby he was deprived, deposed, and degraded, was pronounced.

Mr. *George Franks* proved his own handwriting as proctor of office, and also the Bishop's signature to the before mentioned sentence; he said he had practised for 15 years, and had never known any instance of a sentence to have been taken out or to have been used as evidence in a criminal court, and that he had never seen a sentence with the Episcopal seal annexed.

On the part of the prisoner it was insisted, that to be evidence in a court of law the sentence should have been produced under the Episcopal seal of the Diocesan, and that proof of his signature to the sentence in an official book was not the proper evidence. The learned Judge allowed the evidence to go to the Jury (who found the prisoner guilty), and respited the judgment in order to have the opinion of the Judges whether legal evidence was given of the sentence of degradation, or whether an exemplification of the sentence under the Episcopal seal was the proper proof to sustain the averment.

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THE JUDGES first met to consider this case in Michaelmas Term, 1831, when the general opinion seemed to be that the evidence was sufficient. PENNEFATHER, B., considered it insufficient. The case however was adjourned until the next term (Hilary, 1832), in order that the document which had been given in evidence might be produced to the Judges. At their second meeting, January 18, 1832, ELEVEN JUDGES (*Pennefather*, B. being absent) ruled that the conviction was good. The document given in evidence was not produced(*a*).

(*a*) See *Rex.* v. *Sandys, post.*

THE KING *v.* DOOLIN and Others.

April 18, 30, *May* 2, 1832.

Where a witness, after having been examined for the prosecution, fainted shortly after the commencement of his cross-examination, so as to render it impossible for him to give any further evidence; *Held*, by seven judges against five, that a conviction upon such evidence as had been already given by this witness, taken together with the evidence of other witnesses, was good.

LAURENCE DOOLIN, *Patrick Somers*, *Michael Somers*, *John Somers*, and *Martin Whelan*, were indicted at the Spring Assizes for *Kilkenny*, in 1832, before *Foster*, B., for a burglary; and the prisoners having refused to join in their challenges, *Laurence Doolin* was first put upon his trial.

John Manning, the proprietor of the house where the burglary was charged to have been committed, was produced as a witness for the prosecution, whilst in a state of extreme sickness and debility; he however gave his evidence on the direct examination in a clear and satisfactory manner: but shortly after the commencement of his cross-examination he fainted, and was, in fact, supposed by many to be dead. The learned Baron directed him to be examined by two medical gentlemen who were present; and they being sworn concurred in saying, that his pulse had ceased, and that they considered him

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to be dying. They also declared his further examination to be physically impossible, and that there was no reason to expect that he would recover his consciousness, if the Court were to wait. He was then carried out of Court. The prisoner's counsel upon this insisted that the prisoner was entitled to an acquittal. The learned Baron suggested that there was another course that might be for consideration, namely, the expunging his evidence on the direct examination, and allowing the trial to proceed on such other evidence as might be adduced; and his Lordship stated, that he would wish to hear the propriety of such a course argued by counsel on both sides. The counsel for the prisoner, however, did not accede to this suggestion, insisting that he was entitled to an acquittal, inasmuch as the act of God had deprived the prisoner of that which was his right, namely, the benefit of the cross-examination of this witness, which it was said might have established some contradiction to the evidence of the other witnesses. The learned Baron therefore took the course of allowing the trial to proceed, and directing the jury to take into their consideration all such evidence as they had heard from this witness; with an intention to save the point for the consideration of the twelve Judges, in the event of a conviction.

The wife and daughter of the first named witness were then produced, and their evidence was such as would have warranted a conviction independently of the evidence of *John Manning*. The prisoner went into his defence, and examined witnesses in support of it. He was found guilty; and the learned Baron sentenced him to be hanged on the 28th of April; naming that distant day, in order that the opinion of the Judges might first be

taken. The question for the Judges therefore was, whether the sentence should be carried into execution.

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Two questions were discussed by the Judges: 1st, Whether the testimony of a witness whose cross-examination was prevented by illness, should have been submitted to the jury? 2ndly, If it should not, then whether it was competent for the judge to say, that if the other evidence was, in his opinion, sufficient to warrant a conviction, that conviction should stand and be acted on? Of ten Judges present, SEVEN (BUSHE, C. J., MOORE, J., JOHNSON, J., JEBB, J., BURTON, J., VANDELEUR, J., and FOSTER, B.), were of opinion, that the conviction was right; and of these, five were of opinion in the affirmative on both questions. They thought that the evidence having been legal evidence when given, was legal evidence throughout, and could not be rejected or withdrawn from the consideration of the jury, because an accident had prevented a cross-examination; and that the only effect of this should be, that the Judge should call the attention of the jury to this circumstance, and make such observations as he might think fit, respecting the caution to be observed in consequence of the fatality. On the second point they were of opinion, on the authority of decided cases, as well as on principle, that even if the evidence were to be expunged, and the remaining evidence were, in the opinion of the Judge, clearly sufficient to sustain the verdict, the conviction ought to stand. DOHERTY, C. J. C. Pleas, SMITH, B., and PENNEFATHER, B., doubted on both points, and inclined to think, that the conviction ought not to stand; but PENNEFATHER, B., after the Judges had given their opinion, inclined to think the conviction was right on the first point.

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The analogy between this case, and the case of dying declarations, which are admitted upon trials for murder, appeared to many of the Judges to be quite complete. The dying declaration is held to be equivalent to testimony upon oath, and it is received, although there has been no opportunity to cross-examine. But others of the Judges, including some of the majority above mentioned, did not think the case of dying declarations applicable. They thought that it was an insulated case, where, from necessity, the general rule of examining the witness in the presence of the prisoner, with an opportunity to cross-examine him, was broken through. But it appeared to the former Judges, that on this particular point, viz. of the opportunity of cross-examination having been lost, the case was strictly applicable. The reception of the declaration of a dying man, made not upon a trial, appeared to them to be the anomaly. Such a declaration is admitted in the case of homicide, and in that case only; and apparently on this ground, that the dying man, the cause of whose death is the matter in question, is generally the person who can best tell (and often the only person who can tell), who it was that committed the act; and the urgency of the case may often be such as to make it impossible to proceed in the usual course by examining the witness in the presence of the accused, either upon a trial, or before a magistrate; and therefore, lest so enormous a crime as murder should go unpunished, the declaration, though made in the absence of the prisoner, is received, it being made under a sanction equivalent to an oath.

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On a subsequent day, the Lord Chancellor(*a*), being one of the Lords Justices, came into the King's Bench Chamber, and stated to the Judges there assembled that he had great difficulty in advising or deciding whether an execution should take place in this case; and he discussed with the Judges the opinion to which the majority of them had come, upon which he expressed strong doubts. It was finally determined, that the case should be argued by counsel, an alteration in the Irish practice in conformity to the English, which the Judges had already agreed should take place, whenever the case should appear of such difficulty or importance as to call for it(*b*).

The case was accordingly argued by *Arthur Hamilton*, for the prisoner, and *R. W. Greene*, for the Crown, before the twelve Judges. April 30.

On this day the Twelve Judges met and delivered their opinions *seriatim*. SEVEN JUDGES (BUSHE, C. J., JOY, C. B., MOORE, J., JEBB, J., BURTON, J., VANDELEUR, J., and FOSTER, B.), were of opinion, that the conviction was proper, and that the learned Judge had pursued the proper course in leaving the case to the jury, and submitting to them the evidence of the witness who had been taken ill, accompanied by such observations as from that circumstance he might think fit to make. They were of opinion, that the general rule that a witness shall be subjected to cross-examination, was subject to exceptions, two of which were familiar, namely, dying declarations and depositions before the Coroner, of witnesses who had died before the trial; that this case stood upon the same May 2.

(*a*) *Lord Plunket.*
(*b*) For the resolution on this subject, *vide ante*, p. 1.

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principle, fatality, or the act of God, and that it was a case not more unfavourable to the prisoner, than the two cases of dying declarations and depositions; perhaps less so, as the witness is examined before a Judge, who will take care that no improper questions are put, and that the witness shall answer fully and without evasion. They held, that the evidence being legal when given, and being at the utmost only incomplete, by reason of the interruption of the cross-examination, did not stand on the same ground with evidence which, in the further progress of a trial, became illegal by something then appearing, as for instance, the incompetency of the witness; for that in such case, if the objection had appeared in sufficient time, the witness would not have been examined. That to establish such a rule as the withholding of the evidence in this case, would not only be mischievous to the public, but might be prejudicial to the prisoner; for it would follow from it (as was admitted by those who contended for such a rule), that if a witness for a prisoner after concluding his direct examination, were to die before cross-examination, and his direct evidence to be expunged in consequence, the prisoner would be deprived of evidence which might have produced an acquittal. That the course pursued in courts of equity, where a witness died after his direct examination, and before cross-examination, was applicable to this case; the depositions in such case are read, the Court taking into its consideration the circumstance that there had not been a cross-examination(*a*). They also held, that the Judge ought not have discharged the jury, which was the course that some of the Judges thought should have been followed;

(*a*) See 2 Sch. & L. 158; 1 *Molloy* 157; 1 P. W. 414.

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for that this could only have been done by the desire of the prisoner, and for his benefit: and that in the present case he had not desired it, and it was not necessary for his benefit. On the contrary, the witness had spoken hesitatingly of the identity of the prisoner, upon which circumstance the Judge had made observations in his summing up favourable to the prisoner; besides, unless the prisoner desired that the jury should be discharged, he might complain of an injury, in having a new jury, with power to the crown to set aside. The case of *Rex* v. *Squire*(*a*) appeared to the majority to be an authority for not expunging the evidence, as *Lawrence*, J. had suffered the testimony of a witness to go to the jury, though he did not recover before the Judge's examination of him had concluded, in the course of which something favourable to the prisoner might possibly have appeared.

FIVE JUDGES (DOHERTY, C. J. C. Pleas, SMITH, B., JOHNSON J., PENNEFATHER, B., and TORRENS, J.) were of opinion that the conviction was wrong.

TORRENS, J., thought that the Jury ought to have been discharged; SMITH, B., thought the same, and that the evidence of the witness should not have been submitted to the jury. The other three Judges were of opinion, that the evidence ought not to have been submitted to the jury. They insisted on the generality of the rule, that all witnesses should be subjected to cross-examination, and that if this cannot take place, the evidence is not complete, and cannot be submitted to the jury, if objected to; and they dwelt much on the possible injury

(*a*) 1 Russ. on Cr. 426, note *n*. (ed. 1826.)

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that might accrue to a prisoner, if evidence should be used against him, when there was no opportunity of cross-examining.

All the Judges held, that the Judge should not have directed an acquittal, and none of them rested their opinion on the ground of there being sufficient evidence to convict, independently of the evidence in question. It was however considered, that there might be cases which would authorise this, but that they should be cases where there could be no doubt upon the evidence.

The capital punishment was commuted for transportation.

May 9, 1832.

IN the matter of PRESENTMENTS for DISPENSARIES in the QUEEN'S CO.

Held, that the grand jury had a discretionary power under the 58 Geo. 3, c. 47, to present a less sum than the amount of private subscriptions, for a dispensary.

THE following case was reserved by *Smith*, B., from the Spring Circuit in 1832:

" Several applications for Dispensary presentments under " the 58 Geo. III, c. 47, having been made to the Grand " Jury of the *Queen's County*, they communicated to me " their desire, on the one hand, to present something, but " on the other hand (considering the burthens which the " County had to bear) not to grant a sum equal to the " amount of the subscriptions, but in each case to present " two thirds of such amount; and they enquired of me, if " this could be done. After conferring with my Lord Chief

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"Justice, I stated to them that a majority of the Twelve "Judges had determined that Grand Juries had a right to "decline presenting any thing if they thought fit, but that "the question, whether, if they presented any sum, they "were bound to present one equal in amount to that of the "subscriptions, I did not consider to be so distinctly and "definitively settled, as that it might not be expedient "to submit this point again to the Judges for their "opinion.

"Accordingly, they have endorsed the two sums on "each presentment, viz: a sum equal to that of the sub-"scriptions, and a sum falling short by one-third in each "case of its amount; it being understood that I shall "fiat for the smaller sum, if your lordships think that this "may be done—otherwise for the larger."

The Twelve Judges being present, it was resolved by SEVEN of them, (MOORE, J., JEBB, J., BURTON, J., PENNEFATHER, B., VANDELEUR, J., TORRENS, J., and FOSTER, B.,) that the question whether it was discretionary in the Grand Jury to present any sum they might think proper, not exceeding the amount of the voluntary subscriptions, should not be reconsidered; it being their opinion that the question was settled by the Judges in 1827(*a*), and most of the Judges

(*a*) There had been for some time conflicting opinions upon this point, which was at length settled by the decision in 1827, referred to in the text. That was a decision of a majority of the Judges (upon a case reserved by *Vandeleur*, J., from the Summer Assizes at *Mayo*, in 1826) to the effect that the Grand Jury had a discretionary power as to the sum they should present for a dispensary, and that the statute 58 Geo. III. c. 47, s. 5, was not imperative on them to present a sum *equal* to the amount of the subscriptions, but allowed them either to decline making any presentment at all, or to make one for a less sum than the amount of the subscriptions, supposing all the requisites prescribed by the Act to have been complied with. This decision (which was the result of a long

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having since acted upon that supposition. The other five Judges thought that the question should be reconsidered.

discussion, at two several meetings), overruled a former case decided by eleven Judges (*Vandeleur*, J. *dissentiente*) in Michaelmas T. 1823, upon a question reserved by *Moore*, J. with respect to the Dispensary of *Castlewellan*, Co. *Down*; upon which occasion the statute was held to be imperative.

See the case of *Medical Charities*, Co. *Kerry*, (post), where the same question was raised upon s. 81 of 6 and 7 Wm. IV. c. 116, which now regulates Dispensary presentments. That enactment provides, that it shall be lawful for the Grand Jury "and they are hereby required" to present an equal sum, &c. The words "they are hereby required" are not in 58 Geo III. c. 47.

May 2, 1832.

THE KING *v.* THOMAS MAGUIRE.

The 27 G. III. c. 15, s. 10, so far as it relates to the taking of arms, without the consent of the owner, is repealed by the 1 & 2 Wm. IV, c. 44, s. 2, and therefore an indictment for such an offence, as for a *felony*, cannot be supported.

AT the Spring Assizes of *Longford*, in 1832, *Thomas Maguire* was tried before *Johnson*, J. on an indictment, the first count of which charged, "that he with others unknown, "on the 9th day of January, 2 Wm. IV, at, &c., being "then and there unlawfully assembled, and not being then "and there thereunto lawfully authorised, feloniously and "forcibly seized certain arms, to wit, one gun, then and there "being found, and then and there belonging to one *Richard* "*Campbell*, against the peace and statute." The second count charged that the prisoner, &c., "did feloniously by "menaces, threats, and violence, cause one *Richard Camp-* "*bell* to deliver to them certain arms, to wit, one gun, "against the peace and statute." The third count stated that they "did feloniously by insinuation cause one *Richard* "*Campbell* unwillingly to deliver," &c. The fourth count

stated that they "feloniously and by violence did cause one "*Richard Campbell* unwillingly to deliver," &c.

This indictment was framed under the 27 G. III, c. 15, s. 10, the words of which Act are, as far as relates to this case, "that every person not lawfully authorized, who shall "forcibly seize any arms, or shall by insinuation, menaces, "threats, or violence, cause any person unwillingly to "deliver any arms, shall be adjudged a felon, and suffer "death as in cases of felony, without benefit of clergy." During the progress of the trial doubts occurred to the learned Judge whether the provisions of this Act, as to the offence stated in the indictment, were not virtually repealed by the Act, then recently passed, of the 1 & 2 Wm. IV, c. 44. The trial however proceeded, and the prisoner was convicted; but the learned Judge respited sentence, in order to take the opinion of the Judges on the question above stated.

The learned Judge in reserving this question submitted the following observations: By an Act previous to the 27 G. III, c. 15, viz., the 15 & 16 G. III, c. 21, s. 7, it was provided, as far as relates to the present question, "that "if any person shall at any time *after sunset* and *before sun-*"*rise* or before the hour of six in the forenoon, though the "sun be risen, forcibly take or carry away any gun, sword, or "other offensive weapon without the consent of the owner, or "shall cause the same to be delivered by threats or "menaces, all and every person so offending, being thereof "lawfully convicted, shall be adjudged guilty of felony, "and shall suffer death as in case of felony without the "benefit of clergy." The essential difference between the provisions of the 15 & 16 G. III, and the 27 G. III,

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c. 15, as far as regarded the offence in question, was, that the former confined the felonious taking to the act being done between sunset and sunrise, and the latter had no such limitation, but made the taking of arms in manner therein described, a felony, at whatever time such taking was perpetrated. The late Act of the 1 & 2 W. IV, c. 44, recites the passing of the Act of the 15 & 16 Geo. III, and states that certain offences therein mentioned are punished with death, and that it is expedient to mitigate the severity of said Act, and to make certain amendments therein; it then enacts, that so much of said Act as enacts "that if "any person should at any time between sunset and sunrise "or before the hour of six in the morning, though the sun "should be risen, forcibly take or carry away any gun, "sword, or other offensive weapon, without the consent of "the owner, or should cause the same to be delivered by "threats or menaces, all and every person so offending, "being thereof lawfully convicted, should be adjudged "guilty of felony and suffer death," &c., should be thereby repealed. It then provides and enacts "that if any person "or persons rising and assembling, &c., in manner men-"tioned in said Act of the 15 & 16 G. III, shall take or "carry away any gun, sword, or other weapon whatsoever, "without the consent of the owner, or shall cause the same "to be delivered to him or them by threats or menaces, "all and every person so offending, and being thereof law-"fully convicted, shall be liable to be transported for the "term of his natural life, or be imprisoned with or without "hard labour for any term not exceeding three years; and, "if a male, to be once, twice, or thrice publicly or pri-"vately whipped, if the court shall think fit, in addition "to such imprisonment." This Act, like the 27 G. III, extends its provisions to the taking of arms, whether the

same be done by day or by night. The question therefore was, whether the Act of the 27 G. III. as far as relates to the taking of arms, was not virtually repealed by the Act of the 1 & 2 Wm. IV. c. 44; that offence, which by the 27 Geo. III, was made a felony, being made a misdemeanor by the 1 & 2 Wm. IV, c. 44.

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ELEVEN JUDGES (*Smith*, B. being absent), unanimously held that as far as the taking of arms was concerned, the 27 G. III. c. 15, s. 10, was repealed by the 1 & 2 W. IV. c. 44, s. 2; and that therefore the conviction was bad.(*a*)

(*a*) The conviction could not be upheld under the 1 & 2 Wm. IV, because the offence was laid *feloniously*.

THE KING *v.* FRANCIS ADAMS and THOMAS LANGTON.

June 13, 1832.

THE prisoners were tried before *Bushe*, C. J., and *Smith*, B., at the special commission for the *Queen's County*, in 1832, upon an indictment for administering an unlawful oath, founded on the 27 G. III. c. 15, s. 6, and which was as follows: "The Jurors, &c. upon their oath do say and "present, that *Francis Adams*, late of, &c., and *Thomas*

An indictment under the 27 G. III, c. 15, s. 6, for administering an unlawful oath, is supported by evidence that the prisoner compelled the prosecutor to swear "that he would give up his land to A. B."

The prisoner peremptorily challenged one of the Jury on his coming to the book; the court refused to receive the challenge, and the juryman was sworn. When judgment was about to be pronounced, the prisoner's counsel tendered a plea, praying a reversal of the judgment, because of the challenge not having been allowed, which plea the court refused to receive. *Held*, that the court was right in refusing to receive it.

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" *Langton*, late of, &c., on, &c., at, &c., with force and " arms, unlawfully and feloniously did tender to one *John* " *Large* a certain unlawful oath upon a book, to the im- " port that he the said *John Large* would give up certain land " to the widow *Fennell*, they the said *Francis Adams* and " *Thomas Langton* not being qualified by law to adminis- " ter an oath or oaths; against the peace and statute." Second count: "That the said *Francis Adams* and *Thomas* " *Langton*, on &c., with force and arms, at, &c., unlawfully " and feloniously did cause to be tendered to one *John Large* " a certain solemn engagement upon a book, importing " that he, the said *John Large*, had not any arms, they the " said *Francis Adams* and *Thomas Langton* not being " qualified by law to administer an oath or oaths; against " the peace and statute." Third count: "That the said " *Francis Adams* and *Thomas Langton*, on, &c., with force " and arms, at &c., unlawfully and feloniously did by threats " and force cause and induce to be taken by one *John Large* " a certain unlawful oath upon a book, importing that he the " said *John Large* would give up certain land, they the " said *Francis Adams* and *Thomas Langton* not being " qualified by law to administer an oath or oaths; against " the peace and statute." Fourth count: "That the said " *Francis Adams* and *Thomas Langton*, on &c., with force " and arms, at &c., unlawfully and feloniously did by force " and undue means cause and induce to be taken by one " *John Large* a solemn engagement upon a book, importing " that he the said *John Large* would give up certain land, " they the said *Francis Adams* and *Thomas Langton* not " being qualified by law to administer an oath or oaths; " against the peace and statute." Fifth count: " That the " said *Francis Adams* and *Thomas Langton* on, &c., with force " and arms, at &c., unlawfully and feloniously did by force

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" and undue means cause and induce to be taken by one " *John Large* a solemn engagement upon a book, importing " that the said *John Large* had not any arms ; they the said " *Francis Adams* and *Thomas Langton* not being qualified " by law to administer an oath or oaths ; against the peace " and statute." The evidence in support of the charge was, that the prisoners and other armed men broke into the prosecutor's house, made him go down on his knees, and threw a book to him, upon which they compelled him by threats of destruction to swear " that he would give up " his land to the widow *Fennell*." Counsel for the prisoners insisted that the oath was not unlawful in the sense of the statute, in which, with reference to a provision in the 15 and 16 G. III, c. 21, s. 21, an unlawful oath does not merely mean an oath unlawfully administered, but an oath to do an unlawful thing. The court overruled the objection, and the prisoners were convicted.

The prisoner *Adams* had, when the jury were about to be sworn, peremptorily challenged a juror, *William Fishbourne*, on his coming to the book ; and the Attorney General objecting to the challenge being received(*a*), the Court refused to receive it, and the juror was sworn. When judgment was about to be pronounced(*b*), the prisoner's counsel tendered the following plea : "And the said *Francis* " *Adams* in his own proper person, having heard the judg- " ment of the court, saith, that the same ought to be re- " versed, because he saith that he the said *Francis Adams* " did peremptorily challenge the said *William Fishbourne*, " one of the Jurors impannelled and returned to recognize

(*a*) Because the offence charged was not a capital felony. See *Rex* v. *Phelan*, and *Rex* v. *Whelan*, Hayes Cr. & P. 586 (Edn. 1837).

(*b*) The plea, it will be observed, prays a *reversal of the judgment*.

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" upon their oaths whether he the said *Francis Adams* was " guilty of the felonies aforesaid or not guilty, as he the " said *William Fishbourne* came to the book and before he " was sworn. And the said *Francis Adams* further saith, " that the Right Honorable *Francis Blackburne*, Attorney " General of our said lord the King, who was present pro- " secuting for our said lord the King, did not, nor did any " other person on behalf of our said sovereign lord the King, " demur to said challenge nor plead thereto nor join issue " thereon, but on the contrary declined so to do; nor did said " *Francis Adams* withdraw his said challenge, but insisted " on the same; yet was said *William Fishbourne* sworn to " speak the truth of and concerning the premises, and was " one of the twelve who upon their oaths did say, that he " the said *Francis Adams* was guilty of the felonies afore- " said, and this he the said *Francis Adams* is ready to " verify; wherefore he prays that the said judgment be " reversed." *Blackburne*, Attorney General, objected to the plea being received; and after some controversy it was agreed that if the Twelve Judges, to whom the Court stated their intention to submit the question, should think that the plea ought to be received, the Attorney General should demur to it, *nunc pro tunc*, so that the judgment of the court upon the demurrer might be put on the record.

The opinion of the Judges was therefore requested, 1st, whether the indictment was supported by the evidence? and 2ndly, whether the plea ought to have been received?

TEN JUDGES (*O'Grady*, C. B., and *Torrens*, J., being absent) were unanimously of opinion that it was right to

refuse the plea tendered; and that the indictment was supported by the evidence.(*a*)

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(*a*) See a report of the trial in this case in *Mongan's Maryborough Special Commission Trials*, 241.

IN the Matter of PRESENTMENTS for BRIDGE CONTRACTORS and OVERSEERS in the Cos. of MEATH and KILDARE.

June 13, 1832.

A presentment made by a grand jury at the assizes, upon the memorial of a contractor for building a bridge, to cover the additional expenses incurred by the contractor, in consequence of a change in the site, is illegal.

A presentment of the amount of an attorney's bill of costs, furnished to the county overseers, for preparing a contract, &c., for building a bridge, is illegal.

AT the Spring Assizes at *Trim*, in 1832, on the memorial and affidavit of *James Bell* and *James Pettigrew*, the grand jury of the County of *Meath* presented a sum of £145, to cover an increased expense incurred by the memorialists, by reason of a change in the site of the bridge of *Clonard*.

The memorial stated, that the memorialists had contracted to build a bridge on the river *Boyne*, at *Clonard*, on a site approved of by the two county overseers; but that after they had commenced operations by quarrying and damming, they were requested to attend a meeting of the trustees of the *Mullingar* turnpike road, at which they were directed to point out the line of road approved of by the Counties of *Meath* and *Kildare*, to lead over the bridge in question. They pointed it out, and the trustees disapproved of it; and after some discussion, and objections urged by the memorialists to any change of site, as involving additional expense, the memorialists were prevailed upon to adopt the site proposed by the trustees.

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BRIDGE CONTRACTORS, MEATH.

The overseers were aware of the change, which was acknowledged to be a great improvement. The affidavit stated the amount of the additional expense.

The grand jury, in calling the attention of *Smith*, B., (the Judge of Assize) to this presentment, declared their opinion, that the claim was a fair and meritorious one, and that their wish was to present for it, if such a presentment was warranted by law. The learned Baron accordingly respited the presentment, until the assizes of *Naas*, where it was expected that a similar presentment would come forward, stating his intention, that he would there, as the case might be, fiat, or nil, or respite both; and in the last event reserve a question for the Judges, on the legality of those presentments.

At the assizes of *Naas* the grand jury of the County of *Kildare*, on a similar memorial and affidavit, in like manner presented a sum of £145. The *Kildare* presentment was indorsed as follows :—" We present that the " sum of £145 be paid to *James Pettigrew* and *James* " *Bell*, to remunerate them for extra work done by them " in building the bridge of *Clonard*, by reason of an un- " avoidable change in the original site, provided such " presentment be legal.

" D. O'REILLY, Foreman."

The learned Baron respited both presentments, in order to submit the question of their legality to the twelve Judges. The *Meath* grand jury also presented a sum of £23 12*s.* 3*d.* the amount of a bill of costs furnished to the overseers by an attorney, for preparing the contract for building, and the bond or recognizance, &c. be-

tween the overseers and the contractors. This presentment was also respited. 1832. BRIDGE CONTRACTORS, MEATH.

THE TWELVE JUDGES unanimously decided against all the presentments, viz. those for the additional sums in the respective counties, and that for the bill of costs(*a*).

(*a*) The ground of this decision, as to the bill of costs, probably was, that the works in question did not in their nature warrant the overseers in entering into contracts, but were to be executed in the usual way by the overseers, under the 46 G. 3, c. 96, and that therefore all expenses incurred for contracts were illegal: and as to the additional sums, that in compliance with the 59 G. 3, c. 84, the applications should have been submitted to special sessions.

The law upon the subject of presentments, &c. for roads and bridges, is now considerably altered. The offices of *overseers*, under the 46 G. 3, c. 96, and *supervisors*, under 49 G. 3. c. 84, are superseded and abolished by the appointment of county surveyors under the late Grand Jury Acts, and by the 4 & 5 W. 4, c. 91, s. 3; and the proceedings are now principally regulated by the 6 & 7 W. 4, c. 116, ss. 12, 20, 57, 122, &c.; 4 & 5 W. 4, c. 61; and the 7 W. 4, c. 2, ss. 10, 11, 16, &c.

IN the Matter of PRESENTMENTS by the Grand Jury of the County of ARMAGH.

May 1, 1833.

A SMALL number of magistrates assembled at *Newry*, for the purpose of holding a special sessions for the examination of presentments relating to the barony of *Upper Orier*, pursuant to the 59 Geo. III. c. 84. One day only was appointed by the grand jury for this purpose; and after the magistrates had gone through the accounting affidavits, and the presentments relating to the county at large on that barony, they found it would not be in their

The magistrates at special sessions under the 59 G. 3, c. 84, not having sufficient time to consider *all* the presentments (one day only having been appointed by the grand jury for the purpose), selected a certain number and left the rest unconsidered: *Held*, that such selection did not render the proceedings illegal: *Held* also, that under that Act it is not necessary that all the three magistrates (not being agents) whose presence was rendered necessary at the sessions, should be resident in the county.

1833.

Co. Armagh Presentments.

power to go through the entire of the remaining applications, and in consequence they selected for consideration those presentments, which they thought most requisite and urgent, or felt most interest in, or on which they were best informed; and left the remainder, in which absent magistrates were interested (being about one-half of the entire) unconsidered.

The grand jury having some doubts as to the legality of such a proceeding, submitted those doubts to *Smith*, B., (the Judge of Assize), requesting his opinion, whether the applications thus selected could be considered as legally coming before the grand jury, or whether the entire proceedings at the sessions should be considered as illegal. It was felt that those applications which had not been considered at sessions could not be taken into consideration by the grand jury; and the question was, whether the selection which had taken place gave such a character of illegality to the whole proceeding, as to exclude from the consideration of the grand jury those selected cases which the magistrates had considered; or whether, though the course taken by the magistrates might have been censurable, the applications which they had considered could properly be brought before the grand jury. The grand jury stated, that they did not think any imputation of undue motives attached upon the magistrates, but they thought the precedent might be attended with danger; and, at all events, that the construction of the statute ought to be settled. Upon these points the learned Baron respited the presentments relating immediately to the barony roads, until the opinion of the Judges could be had; but the barony presentments, so

far as they related to the county at large, and also the accounting affidavits for the barony in question, were fiated.

Another point was reserved in this case; viz. whether or not it was necessary that all the three magistrates, whose presence was required by s. 9 of the 59 Geo. III. c. 84, should be resident in the county. In the present case two out of three who attended at the *Ballybot* Sessions were so resident. The question turned chiefly upon s. 4 of the above-mentioned Act, some of the grand jurors holding that the test of residence prescribed by the oath given in that section, applied only to *agents;* and others being of opinion that it applied to all the qualifications.

Nine Judges out out of eleven who met (Doherty, C. J. C. Pleas, being absent), were of opinion, that the presentments should be fiated. Bushe, C. J., & Torrens, J., thought that they should be *nilled* (*a*).

(*a*) The first question in this case may perhaps be applicable to the 6 & 7 W. 4, c. 116, which now regulates the presentment sessions; by s. 17 of which the justices and cess-payers are to consider *all* such applications as may be laid before them, &c.

As to the second question, it would seem that now under s. 9 of 6 & 7 W. 4, c. 116, the attendance of *one* justice would be sufficient.

May 1, 1833. IN the Matter of a PRESENTMENT for Compensation for a MALICIOUS BURNING, in the County of ANTRIM.

To support a burning petition under the 19 & 20 G. 3, c. 37, a written notice upon the high-constable, according to the provisions of the 9 W. 3, c. 9, is necessary, and such notice must be served within six days after the injury.

AT the Spring Assizes for the County of *Antrim* in 1833, a petition was preferred to *Bushe*, C. J., for a presentment for a loss sustained by a malicious burning. Upon the examination of witnesses, the injury appeared to have been committed in consequence of private malice, and not by insurgents. The petition therefore not being founded upon the *Whiteboy* Act, the only question was, whether sufficient notice was given under the Acts of 7 W. III. c. 21, and 9 W. III. c. 9, then expired, but referred to by the 19 and 20 G. III. c. 37.

The party gave written notice to the church-wardens, who were inhabitants near the place where the injury was committed, within forty-eight hours after the injury was committed, and also swore examinations within four days after such notice; so that if the acts required to be done by the 7 W. III. were necessary requisites, they had been performed in this case. But the notice given to the high-constable by the petitioner was not in writing, but parol; and if that notice were necessary (as was insisted by those who opposed the petition), it was not sufficient according to the 9 W. III. c. 9. Counsel for the petitioner, however, argued, that by the 19 & 20 G. III. c. 37, notice to the high-constable was impliedly dispensed with.

ELEVEN JUDGES (*Doherty*, C. J. C. Pleas, being absent) unanimously decided, that the presentment should be nilled, on the ground that notice to the high-constable was necessary, and that such notice should be a written one, and left with him within six days after the injury done(*a*). 1833. BURNING PETITION, ANTRIM.

(*a*) This Act (19 & 20 G. 3, c. 37), is still in force in the County of Dublin.—*Vide ante*, 72, note.

IN the Matter of PRESENTMENTS relating to the Barony of STRABANE. *May* 1, 1833.

AT the Spring Assizes for the County of *Tyrone* in 1833, before *Moore*, J., an objection was taken by a deputation from the town of *Strabane*, to all the presentments in the printed schedule intended to be made on the barony of *Strabane*, on the ground of the applications for such presentments not having been made before the Justices or Magistrates assembled at the special sessions held next previous to the assizes, as appointed by presentment of the grand jury at the preceding Summer Assizes, agreeably to the provisions of the statute 59 Geo. III. c. 84, ss. 1, 2, and 3; and that consequently the grand jury had no legal power to take such applications into consideration, or make any presentment founded thereon.

Held, that the grand jury had no power at the assizes to make presentments upon applications which had not been laid before the magistrates at the special sessions *next before* those assizes, under the 59 G. 3, c. 84.

This objection was met by a statement, that all of the applications then sought to be presented on that barony had been laid before the grand jury at the last Summer Assizes (having been previously to such Summer Assizes

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Co. Tyrone Present-ment.

considered by the magistrates assembled at special sessions), but that the applications had been held over and suspended by the grand jury with the sanction of the Judge (as they conceived), and that therefore the grand jury had still the legal power to consider them.

In answer to this it was urged, that the provisions of the Act were precise and specific; and that even supposing the judge had given such sanction (which the deputation very much doubted) it must have been with the proviso, that the applications should be again submitted to the Road Sessions.

The learned Judge, therefore, reserved for the consideration of the Judges the question whether the grand jury at the Spring Assizes had power to consider those applications, and make presentments thereon; the same not having been made before the Justices or Magistrates assembled at the special sessions held next previous to the Spring Assizes, as appointed by presentment of the grand jury at the preceding Summer Assizes.

All the Judges (except *Doherty*, C. J. C. Pleas) being present, were unanimously of opinion, that the presentments should be nilled(*a*).

(*a*) See ss. 5 and 38 of the 6 & 7 W. 4, c. 116, the Act now in force on the subject in the text. By s. 5, the grand jury are required to fix a time for presentment sessions, *previous to the next assizes*. Sec. 38 enacts, that no presentment is to be made unless an application has been approved *at sessions*, as therein-before provided.

IN the Matter of PRESENTMENTS on the Barony of DUNGANNON, County of TYRONE. *May* 1, 1833.

Applications for presentments cannot be legally made after the precise day appointed by the Grand Jury for holding the sessions, where there has been no meeting on, or adjournment from, that day.

An objection was made at the Spring Assizes for the county of *Tyrone*, in 1833, before *Moore*, J., to all the presentments sought to be made on the barony of *Dungannon*, and also to the proportion for the county at large, presented on that barony, on the ground that the road sessions appointed by the Grand Jury at the Summer Assizes, agreeably to the provisions of the Statute 59 G. III, c. 88, were not held on the day appointed at the place fixed for taking the applications for such presentments into consideration. The Grand Jury had fixed three days for each sessions.

In answer to this objection, it was stated, that although the road sessions were not held at the place appointed, on the *first* day appointed, yet they were held on the next day after the first so appointed, and at the place appointed; and that then the applications had been considered and disposed of.

But in support of the objection, it was insisted that the road sessions must be held and commence on the very day appointed, and if necessary, adjourned; that in this case there was no meeting whatever on the day appointed, and of consequence no adjournment could take place; and that supposing a person to commit perjury at the sessions so held upon the next day as above-mentioned, he could not be legally convicted of perjury, or liable to punishment for such offence.

1833.

Co. Tyrone Presentments, Dungannon.

Under these circumstances it was considered expedient to respite those presentments until the opinion of the Judges should be had, whether they could be legally made upon applications at sessions not holden on the day appointed for taking the same into consideration.

Eleven Judges, (*Doherty*, C. J. C. Pleas, being absent,) were unanimously of opinion that the presentments should be nilled(*a*).

(*a*) This decision will probably apply equally to the 6 & 7 W. 4, c. 116, s. 5.

May 1, 1833.

THE KING *v.* JOHN M'BENNET and JAMES KERNIGAN.

The demand of a gun from the owner's mother in the house of the owner, where his mother lived, is sufficient to support an indictment for demanding property with intent to steal; although the gun was not in the house, or in the mother's possession, at the time of the demand.

The prisoners were tried before *Bushe*, C. J., at the Spring Assizes at *Monaghan*, in 1833, upon an indictment which charged that they unlawfully and feloniously did, with menaces, and by force, demand one gun, the property of one *Margaret Miller*, from her, with intent to steal the same, against the peace and statute. There was a second count, in all respects the same, except that it stated the gun to be the property of *Thomas Miller*.

The first witness was *Margaret Miller*, who swore, that on the 18th of February, at night, three men came to the house of her son *Thomas Miller*, in which she lived as his house-keeper, he being an unmarried man, and with threats demanded a gun from her, to which she answered there was no gun there, and they insisted that there was; that they went away, and in a short time returned and again de-

manded the gun. She further swore that her son, who was not at home that night, had a gun, but that shortly before he had taken it out of the house and concealed it, for fear of people taking it. She said that the prisoners were two of the party that came into the house, and that one *Walters* was the third, but could not say which demanded the gun.

A policeman was the next witness, who swore that he and his party had information of this attack being intended, and that they concealed themselves, and saw the party come to the house and push in the door, and heard them demand the gun, and saw one of them come out; heard him tell another whom they had left as a watch, that there was no gun there, and he then proposed that they should go to another house; upon which another came out and said, "damn you, Jones, come in again, and we'll either "kill her or have the gun." That they then went in, and the police attempted to seize them, and after a violent resistance, succeeded in arresting the prisoners and *Walters*, who was in custody, but was not put upon his trial.

The learned Chief Justice left the case to the Jury, who found the prisoners guilty; but he reserved for the consideration of the Judges the question whether this demand of a gun, which was not in the house, from a person not the owner, and who had not then the possession of it, supported the indictment under the Statute 9 G. IV. c. 55, s. 6(*a*).

ELEVEN JUDGES, (*Doherty*, C. J. C. Pleas, being absent) unanimously held that the conviction was right.

(*a*) Repealed by 1 Vict. c. 87; but s. 7 of the latter contains similar provisions, as far as this case is concerned.

May 8, 1833.

THE KING *v.* CHARLES CONNOR.

An indictment for receiving stolen pigs in *Londonderry*, is supported by evidence that the pigs were first brought to the prisoner in *Donegal*, and afterwards sold by him, slaughtered, in *Londonderry*.

CHARLES CONNOR was indicted and tried before *Johnson*, *J.*, at the Spring Assizes for *Londonderry*, in 1833, for feloniously receiving, at *Londonderry*, two pigs, knowing them to have been stolen, the goods of *Samuel Ferguson*. *Samuel Ferguson* proved that he lived in the county of *Donegal*, and that on the morning of the 24th of February, two pigs of his had been stolen, and that in two days after, he saw the same pigs slaughtered on the premises of *James Hyde*, in the city of *Londonderry*. *James Hyde* proved that he bought the pigs in question from the prisoner, in *Londonderry*, on the 24th of February; they had been killed when the prisoner brought them to him. They were afterwards identified by *Samuel Ferguson*. *Edward Dogherty* proved that he lived in the county of *Donegal*; that he had killed two pigs on the 24th, at the desire of the prisoner, who had brought them to him at his house, and that the prisoner said he had bought them.

It appeared by evidence on the part of the prisoner, that on the day in question, three men brought two pigs to the house of the prisoner, who lived in the county of *Donegal*, and asked him to get them killed for them. These men had left the country at the time of the trial, and were not men of good character.—The prisoner was found guilty.

After the verdict had been given in, it was objected that the indictment was for receiving pigs in the county of *Londonderry*, knowing them to have been stolen. That the word "pigs," in an indictment, must be taken to mean

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"living pigs;" that after pigs are killed, they cease to be pigs, and are pork; and that it did not appear that these pigs had been ever alive in the county of *Londonderry;* and that when the prisoner received the pigs, it was in the county *Donegal*, and that the indictment should have laid the offence in that county, and that the prisoner should have been tried in that county. The learned Judge respited sentence, and reserved for the consideration of the Judges the following questions:—First, did the evidence support the indictment? and secondly, if it did not, as the prisoner had been convicted, what course should be taken to discharge him from such conviction, and to make him amenable to justice? The learned Judge, in reserving these questions, referred to the cases of *Rex* v. *Edwards*, Russ. & Ry. 497, and *Rex* v. *Puckering*, 1 Mood. C. C. 242.

ELEVEN JUDGES (*Smith*, B. being absent,) were unanimously of opinion that the conviction was right.

THE KING *v.* MICHAEL PETTIT.

Michaelmas, 1833.

Indictment for inciting persons not to enter into the employment of R. S. The evidence showed that these persons *had entered* into the employment of, and worked for R. S. The prisoners being convicted, two questions were reserved; first, whether the offence charged was an offence at common law; and secondly, if it were, whether the evidence supported the indictment. *Held*, that the indictment was bad, and the conviction wrong.

THE prisoner was tried before *Moore*, J., at the Summer Assizes at *Longford*, in 1833, upon an indictment containing thirteen counts. It was conceded that the evidence could not support all the counts, but it was urged that there was evidence to go to the jury on the 5th and 6th counts, which were as follows:—"And the jurors aforesaid, "upon their oath aforesaid, do further present that the said

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" *Michael Pettit*, with divers other persons, to the number " of 200 or more, to the jurors aforesaid at present un- " known, being such evil disposed persons as aforesaid, " and wickedly, unlawfully, and maliciously devising and " intending to excite in the minds of the liege subjects of " our said Lord the King hereinafter named, a spirit of re- " sistance and hostility to the laws of this realm, and to " injure, aggrieve, and damnify the said *Robert Sproule*, " for and on account of his the said *Robert Sproule's* " loyalty and obedience to the said laws, on, &c., with " force and arms, at *Granard* aforesaid, in the said county " of *Longford*, unlawfully, wickedly, and maliciously did " solicit, incite, instigate, advise, and endeavour to pro- " cure divers other liege subjects of our said Lord the " King, then and there being, that is to say, *Charles* " *M'Neal*, *Francis Bleakely*, and *Christopher Elliot*, la- " bourers, and then and there being about to be employed " as labourers, and to enter into the service of the said " *Robert Sproule*, not to labour or work for the said *Robert* " *Sproule*, or to enter into the service and employment of " the said *Robert Sproule*, to the great damage of the said " *Robert Sproule*, to the evil example of all others in the " like case offending, and against the peace." The sixth count was the same as the fifth, leaving out the names of the labourers.

The evidence in support of this indictment was as follows.—The three persons named in the fifth count stated, that in the month of July they were employed to work for Mr. *Sproule*, a magistrate in the county of *Westmeath*; they were fourteen in number, who lived in, and were to come from, the county *Fermanagh*. On the evening of the 12th of July they went into the inn of *Granard* on their

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way to Mr. *Sproule's*. The traverser (who lived at the opposite side of the street) came in and asked where they were going; they said to the county *Westmeath* to work for Mr. *Sproule*. The traverser said they were foolish in going to work for Mr. *Sproule*, for that no one would work, or get leave to work for him, because of his being a friend to tithes, and of his taking a ready method of lifting tithes; he then went out of the house and returned after a little, and advised them to go home. On cross-examination they said, they were in Mr. *Sproule's* pay that day; they were to have 1*s*. 3*d*. per day for every day, including that day, and a day for their return home; and when at work, to have potatoes, and milk, and beds in addition. They said it was Mr. *Hurley* who proposed to them to go to work in *Westmeath*, and told them the terms of payment, to which they agreed. They set out, and slept the night of the 11th of *July* at *Wattle Bridge*, and considered themselves in Mr. *Sproule's* service, and at his expense from that day out. They said when they went out of the inn, there were thirty persons or better in the street, who said nothing to them. The people did not hear the traverser's words, which were uttered in the room of the inn, no one being present but their party and the traverser; but seeing the people in the street they were in dread, and asked the sergeant of police to put them out of the town, and they were accordingly escorted about a mile. They went on and worked for Mr. *Sproule*, and after a time went home, and returned again to his work; they did not see the traverser in the street after he left the inn. The sergeant of police deposed, that the traverser lived opposite the inn, and that he met him coming out of the inn. Mr. *Willington*, chief constable of police, deposed, that he saw the party of *Fermanagh* men going up the street,

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and thinking they were recruits for the police, sent the sergeant after them, and on his return ordered the police out.

The traverser's counsel insisted, that the matter charged by the fifth and sixth counts did not amount to an offence at common law, but could at the utmost be only the foundation of a civil action; and that even supposing it to amount to an offence at common law, the evidence did not support the charge; the allegation being that the persons in question were about to be employed and to enter into the service of Mr. *Sproule*, whereas it was contended that the evidence proved that at the time the words were spoken they were actually engaged, and had entered into his employment, and that there was nothing in these counts, or any other in the indictment, which charged the traverser with soliciting, inciting, advising, or endeavouring to procure these persons to leave their employment, or discontinue working for Mr. *Sproule*.

The learned Judge reserved both points for the consideration of the Judges: first, whether the matter alleged in the fifth and sixth counts amounted to an offence at common law? And, secondly, supposing a criminal offence to be legally charged in these counts, whether the evidence was sufficient to sustain such charge?

EIGHT JUDGES (*Johnson*, J., *Pennefather*, B., *Torrens*, J., and *Foster*, B., being absent) were unanimously of opinion, that the indictment was bad, and that the conviction was wrong.

ANONYMOUS.

January 15, 1834.

An indictment is maintainable on the first section of the Party Processions Act, (2 & 3 W. 4, c. 118,) taken by itself.

At the Summer Assizes for the County of *Armagh* in 1833, fourteen persons were indicted, and tried before *Moore*, J., upon an indictment founded upon the first section of the statute 2 & 3 W. IV. c. 118(*a*), charging, "That they, "with others, to the number of 100, on the 12th of July, "(4 W. IV.), at *Lurgan*, did meet and parade together, "and join in procession in a body, for the purpose of "celebrating and commemorating a certain anniversary "and political event, relating to, and connected with, "certain religious distinctions and differences between "certain classes of his Majesty's subjects; that is to say, "the anniversary of the battle of *Aughrim*, and the political "event commonly called the *Battle of Aughrim*, and that "they did then and there bear, wear, and have amongst "them, certain banners, emblems, flags, and symbols, "the display whereof was then and there calculated, and "did then and there tend to provoke animosity between "his Majesty's subjects of different religious persuasions; "that is to say, his Majesty's subjects of the Protestant "religious persuasion, and his Majesty's subjects of the "Roman Catholic religious persuasion, against the peace "and statute." There was a second count, omitting the word "religious;" a third count, the same as the first, only stating the anniversary to be the Battle of the *Boyne;* and a fourth count the same as the third, only omitting the word "religious." When the evidence for the prosecution was closed, the counsel for the traversers called upon the

(*a*) This Act, which expired in 1838, has been continued by the 1 & 2 Vic. c. 34, for five years, from July 4, 1838, and from thenceforth to the end of the next session of parliament.

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learned Judge to direct an acquittal, insisting that the provisions of the several sections of the statute, on which the indictment was framed, formed but one offence, and were to be taken together, and that the legislature having created a new offence, and appointed and prescribed a particular remedy for such new offence, no other method of proceeding could be pursued consistently with the ordinary rules of legal construction, and the necessary interpretation of the words of the statute(*a*).

The learned Judge left the case to the Jury, stating it to be his opinion, that the first section of the Act was sufficient by itself to support the indictment; and after a long deliberation they acquitted eleven of the traversers, and found three of them guilty. The learned Judge, however, respited the judgment, in order to have the opinion of the Judges upon the abstract question, whether upon the first section of the statute, the indictment could be maintained.

TEN JUDGES (*Smith*, B., and *Pennefather*, B. being absent), were unanimously of opinion, that the conviction was right.

(*a*) The second section of the Act gave authority to one or more magistrates, to give notice to the meeting to disperse; and the third section gave a summary jurisdiction to two magistrates, to punish, in case of refusal, by one month's imprisonment for the first offence; "and for a second, or any subsequent offence, *against the provisions of this Act*," by three months' imprisonment. The objection in the case in the text proceeded on the supposition, that a summary tribunal being established for the trial of the offences in the third section, it was the only tribunal which had jurisdiction over the offence created by the first section. The first section, however, makes certain acts amount to a *misdemeanor*, and punishable *accordingly*; the other sections appear chiefly of a preventive nature, making resistance to the magistrate's authority a distinct offence, punishable in a summary manner. The words in the third section "against the provisions of this Act" are (*semble*) to be construed, "in this section mentioned."

THE KING *v.* MARTIN BRYAN.

April 15, 1834.

MARTIN BRYAN was tried and convicted before *Johnson*, J., at the Spring Assizes for *Wexford*, in 1834, for the murder of *Walter Brien*. The deceased was a young man about 16 years of age, and the son of a widow of the name of *Brien*, with whom the prisoner had lived as steward: she had also a younger son and a daughter. The prisoner slept in the barn on the night previous to the murder, and had done so for some time before, with another man of the name of *Bryan* also in Mrs. *Brien's* employment. On the morning of the day on which the murder was committed, the prisoner was seen by a maid-servant at an early hour in the hall of the house. From this hall the stairs went up leading to the bedchamber. After this time the younger brother of the deceased, a boy, who slept with him, called to the maid-servant to come up to his brother; she went up and found him in his bed covered with blood; he had his head deeply and heavily cut as if with a hatchet. There was a great deal more evidence on the part of the crown, but nothing sufficient to bring home this crime to the prisoner; and had the case rested on this evidence he must have been acquitted. Neither did there appear in the course of the trial the slightest grounds which could have induced the prisoner to commit the crime.

The prisoner was convicted upon a confession made to a person who cautioned him not to say any thing to criminate himself; but this confession was merely the second repetition of a former confession made to another person who had previously said to the prisoner, "The evidence at the inquest was so clear against you, that there can be no doubt you are the guilty man." *Held*, that the conviction was right.

The murder was committed on the 12th of August; on the 16th of the same month the prisoner was arrested, and Mr. *Barry*, a Magistrate, saw the prisoner in custody. The prisoner said to Mr. *Barry* that he wished to see the Reverend Mr. *O'Flaherty*, a Roman Catholic clergyman.

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Mr. *Barry* at this time held out neither hope nor threat of any kind, nor did he give him any caution not to criminate himself. Mr. *Barry* sent for Mr. *O'Flaherty*, who was then at Mr. *Barry's* house; Mr. *O'Flaherty* came, and Mr. *Barry* left them together. Mr. *O'Flaherty* was examined, and he stated that on seeing the prisoner he appeared greatly agitated, and the witness said to him, "The evi- "dence at the inquest was so clear against you, that there "can be no doubt you are the guilty man." The witness however was not then called on to state what passed between them as to the murder, but the witness said to the prisoner, "Have you any objection to state to Mr. *Barry* "what you have stated to me?" He said that he had not. Mr. *Barry* was then called in, and the prisoner stated in the presence of Mr. *Barry* what he had before mentioned to Mr. *O'Flaherty*. A difficulty having been expressed whether, under the circumstances of the case and the announcement to the prisoner of his guilt in the terms above mentioned by his clergyman, what had been stated by the prisoner could be received as evidence, the counsel for the crown said they would call Mr. *Barry* again, to state what passed between him and the prisoner at a subsequent interview, in which Mr. *Barry* had cautioned him not to say any thing to criminate himself. Mr. *Barry* was then called, and stated that he had another interview with the prisoner on the evening of the same day on which he and Mr. *O'Flaherty* had seen the prisoner, as he had already stated, and that in this last interview he cautioned him not to say any thing to him or the police to criminate himself. Mr. *Barry* was then allowed to state what the prisoner on this occasion said to him; and he accordingly said that what the prisoner stated on the present occasion was in every respect the same with what he had stated at the prior

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meeting between him and Mr. *O'Flaherty*. The prisoner said he was the person who committed the murder, and that no one else was concerned in it; that he had killed the deceased with the pole of a hatchet, and had given him two blows on the head; he had got the hatchet in the parlour; the deceased lay on the outside of the bed and his younger brother on the inside; he gave him two blows, and the deceased never stirred. This, as far as related to the commission of the murder, was the confession made by the prisoner, as stated by Mr. *Barry*.

The learned Judge suffered the evidence to go to the jury, and the prisoner was convicted, and the usual sentence was passed. In the progress of the trial *Johnson*, J., communicated with *Joy*, C. B., who sat in the Civil Court, and laid the matter before him. They both agreed that the best course to pursue would be to receive the evidence and let it go to the jury, and to respite the execution of the sentence in order that the opinion of the Judges might be taken, whether, under the circumstances stated, the confession was admissible evidence as against the prisoner.

ELEVEN JUDGES (*Joy* C. B. being absent) unanimously held that the conviction was right.

May, 1834. IN the Matter of a PRESENTMENT by the Grand Jury of the Town of GALWAY, for the COLLECTOR OF EXCISE.

The Grand Jury having rejected a presentment for the repayment of the Collector of Excise under the 7 G. 4, c. 74, s. 56, and the Judge at the same Assizes having omitted to add the amount to the Treasurer's warrant under s. 132 of the same Act: *Held*, that the Judge at the Assizes next but one after had authority to order it to be so added.

At the Spring Assizes for the County of the Town of *Galway*, in 1833, the following presentment was offered to the grand jury:—"We, the grand jury at said assizes, "do hereby present the sum of twenty pounds, to be "levied off said county, and paid to the treasurer, and to "be repaid by him to the collector of excise at *Galway*, "being so much advanced to the Inspector-General of "Prisons, as per the annexed receipt, under the Act "7 G. IV. c. 74:—Received from the Collector of "Excise for the County of the Town of *Galway*, the "sum of twenty pounds sterling, being the sum directed "to be paid to me, as Inspector-General of Prisons, by "the Act 7 G. IV. c. 74, s. 56, for my inspection and "report on the gaol of that county, for the year ending "Dec. 1832. Dated this 28th Dec. 1832.

"JAMES PALMER, Inspec.-Gen. of Prisons."

The above presentment was rejected by the grand jury; but the Judge who presided at those assizes omitted to order the above sum of twenty pounds to be added to the warrant of the treasurer, for the purpose of being levied, pursuant to the provisions of the 7 G. IV. c. 74, ss. 56, 132. At the Spring Assizes, in 1834, this presentment was again sent to the grand jury, as also a presentment with a similar receipt for the year 1833. The grand jury rejected both presentments, and the matter of both presentments was then brought before *Burton*, J., the Judge

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of Assize, who directed the sum of twenty pounds, for the year 1833, to be added to the treasurer's warrant; but with respect to the presentment for the year 1832, it was insisted by the grand jury, that they had no authority under that Act to make the presentment, which it was contended could be made only by the grand jury at the Spring Assizes of 1833, under the 56th section, and consequently that the Judge at any subsequent assizes had no jurisdiction or authority under the 132nd section, to orde it to be added to the treasurer's warrant for those assizes; and this question *Burton*, J. reserved for the consideration of the Judges.

All the Judges being present, SEVEN (BUSHE, C. J., JOY, C. B., MOORE, J., JEBB, J., BURTON, J., VANDELEUR, J., and FOSTER, B.,) were of opinion, that the Judge had authority to make the order in question, under section 132 of the 7 Geo. IV. c. 74. The remaining five Judges were of a contrary opinion.

June 14, 1834.

The KING *v.* JEREMIAH M'CLUSKY.

The traverser was indicted under the Mutiny Act of 1834, for voluntarily delivering himself up as a deserter, and was also presented as a vagrant. The Jury found against the traverser upon the indictment, and for him upon the presentment. *Held*, that no judgment could be pronounced against him, and that he ought to be discharged.

At the Spring Assizes for the County of *Armagh*, in 1834, *Jeremiah M'Clusky* was tried before *Moore*, J., on an indictment under the 23d section of the Mutiny Act(*a*): "For that he did voluntarily deliver himself up as a deserter from his majesty's forces." He was at the same time presented in the ordinary way as an idle vagrant without any settled place of residence, and so forth.

The jury found on the first indictment, that he did voluntarily deliver himself up as a deserter from his majesty's forces, but found for the traverser, and against the presentment, on the second charge. Under the Mutiny Act one of the consequences of voluntarily delivering himself up as a deserter was liability to be punished as a rogue and vagabond; and the jury having found against the presentment, the learned Judge did not conceive that he had authority to pronounce any sentence. It was urged, however, on behalf of the crown, (it being a state prosecution,) that the

(*a*) The Mutiny Act for that year was the 4 W. 4, c. 6. That at present in force is the 3 Vict. c. 6, and the corresponding section applicable to this case is also the 23d. The provisions of the latter enactment are somewhat different from those of the 4 W. 4, c. 6, s. 23. The 4 W. 4, c. 6, s. 23, enacts, that any person who shall voluntarily deliver himself up as a deserter, shall be liable to serve in the army, "or shall be liable to be punished as a rogue and vagabond." The 3 Vict. c. 6, s. 23, enacts, that any person voluntarily delivering himself up as a deserter, shall be liable to serve, &c., "and in case such person shall not be a deserter from the regiment stated in his confession, he shall be liable to be punished as a rogue and vagabond, or may be prosecuted and punished for obtaining money under false pretences;"—"and if the person so confessing himself a deserter shall be serving at the time in any of her Majesty's forces, he shall be deemed to be and dealt with as a deserter," (i. e. handed over to the military power).

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prisoner having voluntarily delivered himself up as a deserter, he thereby became liable to be punished as a rogue and vagabond, without, and even against, the finding of a jury, that he was so; but it appeared to the learned Judge that whatever might be the strict construction of the 23d section of the statute, he ought not to punish the prisoner as a vagrant after it had been negatived that he was such, upon a presentment prepared and presented by the crown counsel, and to sustain which the only evidence given was his having delivered himself up as a deserter; and he, therefore, reserved for the consideration of the Judges the question, whether in this case any, and if any, what judgment should be pronounced.

TEN JUDGES (*Smith*, B., and *Vandeleur*, J., being absent,) ruled that the prisoner should be discharged(*a*).

(*a*) *Quære* as to the exact meaning of "rogue and vagabond" in the Mutiny Act, as applicable to *Ireland*. As that Act extends to both countries, it is to be presumed that the expression is to have as nearly as possible the same meaning in both. In *England* it appears to be well defined; *Ballie's Case*, 1 Leach, 696; but in *Ireland*, it must mean either a "vagrant," who (by a system peculiar to *Ireland*,) is to be *presented* under the 9 G. 2. c. 6, and 31 G. 3. c. 44; or else an offender under the old Acts of 33 Hen. 8. c. 15, and 10 & 11 Car. 1. c. 4, which by the 13 & 14 G. 3, c. 46, are kept in force in the *King's County*, and the Counties of *Armagh*, *Wexford*, and *Wicklow*. The latter class of Acts do not seem to create an *indictable* offence, but merely to give a summary authority to justices of the peace.

In the case in the text, the decision would appear to rest on this ground: If the words "rogue and vagabond," meant "vagrant" under the 9 G. 2, c. 6, and 31 G. 3, c. 44, the finding of the Jury on the presentment put an end to the question; and if they meant an offender under the old Acts, those Acts gave no power to the Judge of Assize to sentence.

Nov. 26, 1834. In the Matter of ROBERT HENRY SOUTHWELL, a defendant in WOOLSEY *v.* SOUTHWELL, and other causes.

A person in custody under an illegal arrest is entitled to be discharged from collusive detainers lodged at the same time, and *bonâ fide* detainers subsequently lodged with the same sheriff; but not from *bonâ fide* detainers lodged with the marshal of the marshalsea, to which he had been removed by *habeas corpus*, upon his own application.

In Michaelmas Term, 1834, various motions had been made on behalf of *R. H. Southwell*, a defendant in several actions in the three law courts, for his discharge from custody at the suit of various detaining creditors. *Southwell* had been arrested in June 1834, by the sheriff of the County of *Wicklow*, under a forged writ of *capias ad satisfaciendum*, purporting to have issued from the Court of Common Pleas. The sheriff had also in his hands at the time of the arrest other writs which had been issued collusively with the plaintiff in the first writ against the defendant; and several detainers were laid on him after the arrest, and whilst in the custody of the sheriff of *Wicklow*, by *bonâ fide* creditors, and without collusion. He subsequently had himself removed to the Marshalsea, by *habeas corpus cum causâ*, and after his removal thither several other detainers were lodged with the marshal. There were thus three classes of detainers:—First, the collusive writs in the sheriff's hands at the time of the arrest. Secondly, *bonâ fide* detainers laid on after his arrest, and whilst the defendant remained in the custody of the sheriff of *Wicklow;* and thirdly, *bonâ fide* detainers laid on after his removal to the custody of the marshal.

The Court of Common Pleas discharged the defendant from the first arrest, and from the detainers in that Court, of the first class, viz. the writs in the sheriff's hands at the time of the arrest; but took time to deliberate as to the

course to be pursued with respect to the subsequent detainers(*a*).

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Motions were also made in the Court of King's Bench for discharging the defendant from the second and third classes of detainers in that Court; and the Court of King's Bench took time to deliberate as to the course to be pursued. The question had been fully argued both in the Common Pleas and in the King's Bench.

On the last day but one of the term, a motion was made in the Court of Exchequer to discharge the defendant from the detainers of the second and third classes. The motion was made upon notice, and was not opposed by the detaining creditors; and the Court of Exchequer was informed by counsel that the other two law courts only waited for the decision of the Court of Exchequer. The Court of Exchequer thereupon made an absolute order (which, however, was afterwards changed into a conditional one,) for the discharge of the defendant in the cases before the Court. The Courts of King's Bench and Common Pleas reserved their decision until they should have conferred with one another, and with the Exchequer.

All the Judges (except *Johnson*, J.,) being present, the case was fully discussed, and the opinions of the Judges were delivered *seriatim*. The result was as follows:—First, ALL THE JUDGES were of opinion that the defendant should be discharged from the writs of the first class, viz. those in the sheriff's hands when the arrest was made. Secondly, SEVEN JUDGES (JOY, C. B., SMITH, B., MOORE, J.,

(*a*) Vide *Carson* v. *Southwell*, 3 Law Rec. N. S. 94.

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BURTON, J., PENNEFATHER, B., TORRENS, J., and FOSTER, B.,) were of opinion that he should be discharged from the writs of the second class, viz. detainers laid on after the arrest, and before his removal to the Marshalsea; and the remaining FOUR JUDGES were of opinion that he should not be so discharged. Thirdly, SIX JUDGES (BUSHE, C. J., DOHERTY, C. J. C. Pleas, MOORE, J., BURTON, J., VANDELEUR, J., and CRAMPTON, J.,) were of opinion that the defendant should not be discharged from the writs of the third class, viz. the detainers laid on after his removal to the Marshalsea. The other FIVE were of opinion that he should be so discharged(*a*).

(*a*) The following authorities were cited and considered during the discussion:—1 Saund. 298; 6 G. 1, c. 21, s. 53, *Eng.*; 2 Wils. 47, 48; 1 Rose's Bankr. C. 262; 1 Chitt. Rep. 579; 9 Bing. 566; 2 Moore and Sc. 634; 2 And. 462; 11 Price, 156; 1 Tidd's Pr. 219, 220; 2 W. Bl. 823; 2 Bos. & P. 282; 2 B. & Ald. 743; 1 Dowl. 499; 1 New Rep. 135; 8 B. & C. 769.

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The KING *v.* RICHARD SANDYS.

On the trial of a degraded clergyman, for celebrating a marriage between a Protestant and a Roman Catholic, an entry, signed by the Registrar of the Consistorial Court, of the sentence of degradation, in a book which contained also an entry of the previous proceedings, is sufficient evidence of the degradation.

THE prisoner was tried before *Smith*, B., at the Spring Assizes at *Maryborough*, in 1835, on an indictment(*a*) which charged "that he on the 4th of October, 1834, at &c., was "a degraded clergyman of the United Kingdom of *England* "and *Ireland*, and that he being such feloniously and unlawfully did celebrate a marriage between *Wally Gray*, a "protestant, and *Catherine Donnelly*, a papist." The second count was similar, but described the prisoner as a degraded

(*a*) Under the 12 G. 1, c. 3.

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clergyman of the church of *Ireland*, as by law established. The third count was like the second, for celebrating a marriage between *Wally Gray*, a reputed protestant, and *Catherine Donnelly*, a reputed papist. The fourth count described the prisoner as a layman pretending to be a clergyman, &c., and as such celebrating a marriage between *Wally Gray*, a protestant, and *Catherine Donnelly*, a papist. The fifth count, describing the prisoner like the fourth, was for celebrating a marriage between a reputed protestant and a reputed papist. The sixth count, describing the prisoner like the first, was for taking upon himself to celebrate a marriage between *Wally Gray*, a reputed protestant, and *Catherine Donnelly*, a reputed papist.

The following were the proofs in support of the above indictments.—*Henry Davis*, clerk in the registry office of the diocese of *Leighlin*, produced the original entry, got by him in the office, and which purported to be a sentence of degradation against *Richard Sandys*, priest and deacon.—The Rev. *Thomas Harpur*, a beneficed clergyman of the established church, who had been present at the degradation, identified the prisoner as the object of that sentence. He said that he did not know where the prisoner was at the time of that sentence; nor whether any citation had been served.—*Henry Davis* being called up a second time, said he had held his present situation for one year from February, 1834; did not know who produced the book on a former trial in 1828; was not in office when the sentence was signed; knew Mr. *Preston*, the registrar; Mr. *Browne* was his deputy, and had the care of all the official papers, and witness was a clerk in his office.—Mr. *Harpur* being also called up again, proved the signature of Mr. *Preston*, the registrar, to be his handwriting; believed, indeed was

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sure, that he had seen him write; but besides, he had been in correspondence with him, and had received from him letters in answer to letters written by witness to him; witness had been for twelve years incumbent.—*Arthur Moore Moss*, esq., proved that he had seen the prisoner officiate as curate in the protestant church of the parish; never saw him marry any one.—*Catherine Donnelly*, a dress-maker, proved that she knew Mr. *Gray;* she was unmarried; he proposed marriage, and she agreed; they went together for the purpose of being married, accompanied by Mr. *Hutchins.* The prisoner performed the ceremony according to the forms of the protestant church. Mr. *Gray* was a protestant; witness was a Roman Catholic; after that ceremony they cohabited as man and wife; they did not now; Mr. *Gray* had left her; she had known him for three or four years; witness was about twenty years of age, not quite twenty; Mr. *Gray's* father was a magistrate; the marriage took place at *Clonena;* witness never saw *Sandys* before or since; witness attended the trial under a summons.—*Thomas Hutchins* proved that he was a policeman; was acquainted with *Gray;* at his request he went with him and last witness, and was present at the marriage; eight shillings were paid, and twelve more promised to be paid next day; the ceremony was performed on the 4th of October, 1834, about two o'clock, according to the protestant form; witness never saw *Sandys* before or since, except when he was going into the Old Gaol; he identified him; the ceremony lasted about three quarters of an hour. Here the evidence for the prosecution closed.

The prisoner called Mr. *Thomas Mosse*, who said he knew the prisoner in 1813, when he was looked upon as

highly respectable; he had, however, been tried for, and convicted of, offences similar to the present.

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The Jury found the prisoner guilty, and judgment of death was recorded; but he was recommended by the learned Baron to eighteen months imprisonment.

Before the verdict, *Daly*, as counsel for the prisoner, objected to the legality and sufficiency of the evidence for the prosecution.

The objection was thus stated:

Queen's County, to Wit. } BE it remembered, that at the *Maryrough* Lent Assizes, in the year 1835, held before the Honorable Sir *W. C. Smith*, bart., *Richard Sandys*, clerk, was arraigned for having, on the 4th of October, in the year 1834, being a degraded clergyman of the church of *Ireland*, celebrated a marriage between one *Wally Gray*, and one *Catherine Donnelly*, contrary to the statute; to which charge the said *Richard Sandys* pleaded not guilty; on which a Jury being impannelled to try the said issue, counsel learned in the law gave in evidence on the part of the crown, to maintain and prove the said issue, a book brought from the Consistorial Court at *Carlow*, and purporting to contain therein an entry signed by the registrar of said Court, and which recited merely that said *Richard Sandys* was degraded as to his rank of clergyman; and said counsel learned in the law insisted on the part of the crown that said entry contained in said book was conclusive evidence of the degradation of the said *Sandys* from his rank of clergyman of said church of *Ireland;* but in reply to this, counsel learned in the law

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of the said *Richard Sandys* did then and there insist before the said Honorable Sir *W. C. Smith*, bart., that said evidence was not sufficient to convict the said *Sandys*, inasmuch as there was no evidence clear and satisfactory that said book of said Consistorial Court was publicly kept, and also inasmuch as (if said evidence were conclusive of said sentence of degradation,) there ought to have been regularly given in evidence on the trial of said issue, the proceedings on which said sentence of degradation was founded (1 Phil. Evid. 373; Peake on Evid. 74;), analogous to the practice relative to decrees of the High Court of Chancery; whereas the truth and fact is, that no such evidence was produced by the counsel learned in the law on the part of the crown, though insisted on by the counsel on the part of said *Sandys*.

At the meeting of the Twelve Judges, the book of the Consistorial Court was produced, and it appeared that the previous proceedings were entered therein. THE TWELVE JUDGES were of opinion that the conviction was right(*a*).

(*a*) Vide *Rex* v. *Stonage*, ante, 121.

IN the Matter of a PRESENTMENT for Repayment of Advances to BOARDS OF HEALTH, County MAYO. *Easter*, 1835.

THE Lord Lieutenant having directed that several sums of money, amounting in the whole to the sum of £6,636 14*s.* 2*d.* should be advanced out of the consolidated fund, pursuant to the provisions of the 58 G. III. c. 47, and the 2 W. IV. c. 9, to the respective boards of health, which had been established in different districts of the country of *Mayo*, an application was made at the Spring Assizes for *Mayo*, in 1835, to the grand jury of that county, to present the sum of £6,636 14*s.* 2*d.* to be levied off the county of *Mayo*, to repay the sums which had been so advanced. The grand jury thought that the sums which had been so advanced should not be levied off the county at large, but off the respective districts to which the money had been advanced, and in the proportions in which such districts had respectively received the same.

Held, that a presentment for the repayment of money advanced by the Lord Lieutenant out of the consolidated fund, under the 58 G. 3, c. 47, & 2 W. 4, c. 9, to the Boards of Health established in different districts of a county, should be raised off the county at large, and not off the respective districts.

Vandeleur, J. (the Judge of Assize) accordingly reserved for the consideration of the Judges the question, whether the grand jury was bound to present the said sum of £6,636 14*s.* 2*d.* to be levied off the county at large, or had a right to elect whether it should be levied off the several districts to which it had been advanced, and in the proportions in which they had respectively received the same. A similar question was raised by the grand Jury of the county of *Roscommon*, and reserved by *Burton*, J.

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THE TWELVE JUDGES unanimously decided, that the county at large is imperatively subject to the charge.(*a*).

(*a*) The 6 & 7 W. 4, c. 116, s. 90, now regulates the repayment of advances. It uses the general words, that the sums advanced "shall be raised off such county."

Easter, 1835. IN the Matter of PRESENTMENTS for advances from Government for the repair of ROADS in the Co. ROSCOMMON.

Held, that the 6 G. 4, c. 101, s. 5, and the 1 & 2 W. 4, c. 33, s. 107, as to presentments by grand juries of sums equal to those advanced out of the consolidated fund for the repair of roads, were imperative upon the grand jury.

AT the Spring Assizes for the County of *Roscommon*, in 1835, three presentments were laid before the Grand Jury, one of which was as follows, the two others being of the same description: "We present the sum "of £54 17*s.* 5*d.* to be levied off the County at large, "paid to the treasurer, and by him to the collector of "Excise in *Athlone* District, to reimburse his Majesty's "treasury like sum advanced for the repairs, &c. of cer- "tain public roads in this County." A letter in the following terms was at the same time laid before the Grand Jury: "Whereas in pursuance of the provi- "sions of an Act passed in the 6th year of the reign "of his late Majesty Geo. IV, entitled, 'An Act to pro- "'vide for repairing, maintaining, and keeping in repair "'certain roads and bridges in Ireland,' and of an Act "passed in the 1 & 2 years of Wm. IV, entitled, 'An "'Act for the extension and promotion of Public Works "'in Ireland,' several roads situate in the County of *Ros- "common* have been made, the whole, or at least one-half "of the original cost whereof has been defrayed at the "public expense; I, Sir William Gossett, K. C. H., under-

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" secretary to the Lords Justices, general and general gover-
" nors of Ireland, do hereby certify to the secretary of
" the Grand Jury of the said County of *Roscommon*, that
" the sum of £54 17*s.* 5*d.*, advanced out of the consoli-
" dated fund, has been expended upon the repairs of the
" said roads so situate and lying in and within the County
" of *Roscommon*, of which sum of £54 17*s.* 5*d.* the said
" Grand Jury are by the said Act required to make pre-
" sentment. Dublin Castle, Feb. 27, 1835.

WM. GOSSETT."

The Grand Jury objected to making the presentments, upon the grounds that the roads to which they related were not in their opinions put in good and sufficient repair, and that the account of the manner in which the money had been expended should be also laid before them, for their examination and investigation; and upon the matter being brought before *Burton*, J. (the Judge of Assize), and the Grand Jury having been told by him that the law was imperative upon them to make the presentments, they at length consented to make them, on the assurance of the Judge that the question (whether the law was imperative upon the Grand Jury to make the presentments, or whether the Grand Jury had a right to exercise their judgment upon the fact of the roads being put into good and sufficient repair, and the money properly expended or not, and thereupon to make or reject the presentments) should be submitted to the consideration of the Twelve Judges. The fiating of the presentments was accordingly reserved for such consideration. The statutes referred to in this case were the 6 Geo. IV. c. 101, ss. 2, 3, 4, 5, 7, and 8; and the 1 & 2 Wm. IV. c. 33, ss. 83, 107, and 111.

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THE TWELVE JUDGES were unanimously of opinion that the law was imperative upon the Grand Jury to make the presentments, upon the proper certificates being laid before them(*a*).

(*a*) The 1 & 2 W. 4, c. 33, s. 107, revived the 6 G. 4, c. 101, ss. 4 & 5 of which regulated the advances by government, and the repayment by presentments. The 6 & 7 W. 4, c. 116, s. 61, (referring to the 1 & 2 W. 4, c. 33,) now regulates the advances by government, and s. 62, the repayment. The difference between the wording of the latter enactment, (6 & 7 W. 4, c. 116, s. 62,) and that of the other two Acts, (6 G. 4, c. 101, s. 5, and 1 & 2 W. 4, c. 33, s. 83,) consists chiefly in the 6 G. 4, and 1 & 2 W. 4, using the words "authorized and required" to present; and the 6 & 7 W. 4, the words, "shall make presentment."

Easter, 1835.

IN the matter of the appointment of INSPECTORS OF WEIGHTS AND MEASURES.

Held, that the 6th and 7th sections of the 4 & 5 W. 4, c. 49 (Weights and Measures), were imperative.

AT the Spring Assizes at *Naas*, in 1835, the Grand Jury applied to *Smith*, B., for permission to omit acting upon the 6th section of the 4 & 5 Wm. IV. c. 49(*a*), as to appointing an inspector of weights and measures, &c. They made this application on the ground of a supposed intention in the legislature of speedily altering the law; and of their wish therefore to save the County an expense in the *interim*. Some of the body had received information of this intended change from one of their county members, whose letter they submitted to the learned Baron, who, however, thought and told them, that no prospect of a change in the law could justify an omission to act upon the injunctions of the statute law, as it then stood.

(*a*) Repealed by the 5 & 6 W. 4, c. 63, which, however, contains similar provisions in ss. 19 & 20. The latter Act is referred to by 6 & 7 W. 4, c. 116, s. 116.

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They then inquired of his lordship whether he considered the sixth section as peremptorily imperative; and he told them he thought it was. They finally agreed to make the presentment appointing an inspector, requesting the learned Baron to respite it for the opinion of the Judges, as to whether the sixth section was imperative, and left nothing to their discretion. As no inconvenience could result to the County from this, he consented to do so.

On the same principle, having made the inquiry prescribed by the seventh section, and learned that a complete set of copies of the imperial standard weights and measures required by that section had not been provided, the learned Baron made the order upon the Treasurer which that section directed, but suspended the effect of such order until the opinion of the Judges upon this part of the case also should be had.

THE TWELVE JUDGES were unanimously of opinion that the two sections in question were imperative.

Easter, 1835. IN the Matter of a Presentment by the Grand Jury of the KING'S COUNTY for the salary of the COUNTY SURVEYOR.

Held, that where a County Surveyor had been appointed only two months before the Assizes, the Grand Jury were not bound to present for a full moiety of his salary, or a full moiety of the expenses of his office and clerk, under ss. 39 and 41 of the 3 & 4 W. 4, c. 78. *Held*, also, that even if the moiety ought to have been presented by a former Grand Jury, a subsequent Grand Jury could not rectify the mistake.

AT the Spring Assizes for the *King's County*, *in* 1835, a presentment was offered to *Bushe*, C. J., under the following circumstances.

Mr. *Richard B. Grantham* was appointed surveyor to the *King's County* by warrant from Lord *Wellesley*, then Lord Lieutenant of Ireland, dated May 16th, 1834. The Assizes for the *King's County* commenced on the 17th of July following, and the Grand Jury then assembled presented £41 13*s.* 4*d.* to the Surveyor as his salary for two months at the rate of £250 per annum, pursuant to the 3 & 4 W. IV. c. 78, s. 39(*a*), which commenced in operation in May 1834. The Grand Jury at the Spring Assizes presented a further sum of £8 6*s.* 8*d.* to the same surveyor for the expense of an office and salary of a clerk for two months at £50 per annum, pursuant to s. 41 of the same Act.

Mr. *Grantham* conceiving himself entitled to the half of the yearly sum of £250, inasmuch as it was required by s. 39 of the 3 & 4 W. IV. c. 78, that the Grand Jury should fix the amount of the Surveyor's salary, and present a moiety of that salary, and that payment of the same should be made accordingly; and also conceiving himself

(*a*) The provisions of this section, and of the 41st, afterwards mentioned, have been re-enacted *verbatim* by the 6 & 7 W. 4, c. 116, ss. 41 and 43.

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entitled to half the sum of £50, pursuant to s. 41, which stated that the Grand Jury was authorized and required to present a sum of £50 to defray the expenses of an office and salary of the clerk, a moiety of which the Grand Jury was authorized and required to present at each Assizes; applied to *Bushe*, C. J., on the first day of the Spring Assizes for the *King's County*, in 1835, stating that in ignorance of what he had since been advised he was legally entitled to, he submitted at the last Assizes to the presentments then made; but at the present Assizes had applied for presentments for the sums in which the former were deficient, to the Grand Jury, who required the opinion of the learned Chief Justice upon the subject. Upon which, having sent for the Grand Jury, and considered the statute, he told them that it appeared to him that the former Grand Jury ought to have presented full half years' salaries to the Surveyor, and for his office and clerk; but that he had doubts whether the mistake (if it were one) could be rectified by the present Grand Jury, and whether the matter, being of a fiscal nature, could be discussed after the opening of the commission under the 29th section of this statute. The Grand Jury upon this, at the recommendation of his lordship, passed two presentments, which were respited until the opinion of the Judges should be obtained upon the following questions:—1st, Whether the construction contended for by the Surveyor was right; and 2ndly, If so, whether it was competent to the Court and Grand Jury to rectify the mistake in the manner before mentioned. The presentments were as follows:

"We present the sum of £83 6*s.* 8*d.* to be raised off "the county at large, and paid to *Richard B. Grantham*,

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" Esq., county surveyor, to reimburse him the balance of " the moiety of his salary omitted to be presented at last " Assizes (3 & 4 Wm. IV. c. 78, s. 39)."—" We present " the sum of £16 13*s.* 4*d.* to be raised off the county " at large, and paid to *Richard B. Grantham*, Esq., to " reimburse him the balance of the moiety of the ex- " pense of an office and salary for his clerk omitted to " be presented last Assizes (3 & 4 Wm. IV. c. 78, " s. 4)."

All the Judges being present except *Torrens*, J., SIX of them (DOHERTY, C. J. C. Pleas, JOY, C. B., JOHNSON, J., VANDELEUR, J., FOSTER, B., and CRAMPTON, J.,) were of opinion that the presentments were bad on both grounds, viz.: first, because the Grand Jury had a power to present less than a moiety; and secondly, because even supposing the Grand Jury to have been bound to present a full moiety, still a subsequent Grand Jury could not rectify the mistake of a former. The other five Judges rested their opinion on the second ground alone, upon which all the Judges were unanimous.

THE KING *v.* PATRICK TIERNEY.

Feb. 3, 1836.

An indictment for perjury, stating that the traverser "did maliciously depose and swear," &c., and concluding, that so the said traverser "falsely, maliciously, and wickedly, *in manner and form aforesaid*," did commit perjury, is bad.

The traverser was tried at a commission of Oyer and Terminer for *Dublin*, in 1836, before *Moore*, J., and *Johnson*, J., upon an indictment for perjury alleged to have been committed in an affidavit sworn by him in a cause in the King's Bench. There were two counts in the indictment, and in each count, after the usual statements and inducement, it was alleged, "that the said *Patrick Tierney* being "sworn as aforesaid, not having the fear of God, &c., did "then and there, &c., maliciously depose and swear "amongst other things, &c." (here followed the affidavit upon which the assignments of perjury were founded; and after these assignments each count concluded): "And so "the jurors aforesaid upon their oath aforesaid do say and "present that the said *Patrick Tierney*, on, &c., at, &c., "falsely, maliciously, and wickedly, in manner and form "aforesaid, did commit wilful and corrupt perjury."

To this indictment counsel for the traverser objected on the following grounds; that the offence as charged in the indictment was not perjury; that the statement that he did "maliciously depose and swear" was insufficient to sustain it; and that the conclusion of law at the end of each count was immaterial and did not aid it. Counsel referred to *Rex* v. *Cox*, 1 Leach 71; the note to *Rex* v. *Davis*, 1 Leach, 494; *Rex* v. *Stevens*, 5 B. & C. 246; and 2 Chit. C. L. 312.

Eleven Judges (*Torrens*, J. being absent) unanimously held that the indictment was bad, and that the judgment ought to be arrested.

Feb. 3, 1836. IN the matter of a PRESENTMENT for compensation for a MALICIOUS INJURY in the County of CARLOW.

Held, by six Judges against five, that s. 70 of the 3 & 4 W. 4, c. 78, repealed all former laws on the subject of malicious injuries to property, and that therefore the malicious burning of a pew in a Roman Catholic chapel, while the country was in a state of disturbance merely arising from an *election*, was a proper subject for compensation, though not an injury under the *Whiteboy* Act: and that the notices and examinations required by the former laws were no longer necessary.

At the *Carlow* Summer Assizes in 1835, *Patrick Neil* lodged a petition, which had been approved of at special Sessions (as appeared by endorsement thereon), for compensation for an injury done to him by destroying his Pew in the Roman Catholic Chapel of his parish. It was opposed in the first instance by a cess-payer under the 72d section of the 3 & 4 Wm. IV. c. 78. On the part of the petitioner it was proved, that in January 1835, the County of *Carlow* was in a state of great disturbance and insubordination on account of the election of members of Parliament, and that many men had suffered severely in their persons and properties for having voted against the popular candidates: so much so, that it had become necessary to establish nightly patrols for protection; but the witness who proved these facts admitted, upon cross-examination, that there was not in the county any other kind of disturbance except what grew out of the election. He said that the election began on the 13th and ended on the 17th of January, and that the petitioner, who was his father's tenant, had voted for Messrs. *Kavanagh* and *Bruen*, the unpopular candidates. The petitioner swore he had built a large pew in the chapel at his own expense, which had cost him £10; and that the timber-work was in some instances made of boards three inches thick, which could only have been separated with a hatchet, and that it required 21 men to carry it into the chapel; that on the Sunday before the 16th of January he and his family sat in

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it; on the evening of Thursday, the 15th, he saw it in full preservation, but on the following morning at 9 o'clock he found the ruins of it strewed about the fields and roads in many fragments, and part of it was tied up in a tree near his house in the shape of a triangle or gallows; and that he did not know who committed the offence. Being cross-examined as to what had became of the boards, he said that the school-master and his scholars had taken them away, and burned them in the school-room. The cess-payer who opposed the petition then examined two witnesses to prove that the petitioner had overvalued the pew, which could be restored for a very trifling expense; the last of those witnesses swore that all pews in the chapel belonged to the parish, and were subject to be regulated by the priest.

Upon this *Bushe*, C. J. (the Judge of Assize), sent the case to the Grand Jury, who presented the sum of £9 12*s.* 6*d.* to the petitioner; and his lordship respited the presentment for the opinion of the Judges upon two objections made by the cess-payer's counsel: 1st, That the disturbance in the county was not such as warranted a presentment for the injury; 2nd, That the petitioner had not such a property in the pew as entitled him to compensation.

ELEVEN JUDGES having met (*absente Torrens*, J.) SIX of them (JOY, C. B., DOHERTY, C. J. C. Pleas, PENNEFATHER, B., JOHNSON, J., CRAMPTON, J., and FOSTER, B.) were of opinion that the presentment was legal; holding that the 3 & 4 Wm. IV. c. 78, s. 70, had repealed all former laws on the subject of malicious injuries to property, and that therefore the injury in this case, though not of a

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Whiteboy class, was a proper subject for compensation by presentment: and they (with the exception of *Johnson*, J.) held that it was no longer necessary to give the notices and make the examinations required by the former laws. The minority (consisting of BUSHE, C.J., SMITH, B., BURTON, J., MOORE, J., and PERRIN, J.,) were of opinion that the old laws were not repealed, and that the injury not being of the Whiteboy class was not the subject of presentment. They also (with the exception of *Perrin*, J.) held, that the notices, &c., under the former Acts, were still necessary(*a*).

(*a*) See the note to the case of the *Galway Burning Petition*, *ante*, p. 72. Since that note was printed, a bill has been brought into Parliament (session 1841,) to extend the provisions of the 6 & 7 W. 4, c. 116, to the county and county of city of *Dublin*. That Act, as the law at present stands, regulates (by s. 135,) the giving of notices to the high constable and churchwardens, &c., in all other counties but that of *Dublin;* the omission of which regulations in the 3 & 4 W. 4, c. 78, s. 70, gave rise to the question in the case in the text.

Feb. 3, 1836.

IN the Matter of Presentments for OFFICERS' FEES on BURNING PETITIONS, Co. Armagh.

Held, that the 4 G. 4, c. 43, s. 1, did not preclude clerks of the crown or judges' criers from taking fees on burning petitions; and that these fees might be included in the presentments, as part of the damages sustained by the petitioners.

AT the *Armagh* Summer Assizes in 1835, several petitions for burning and other injuries came before *Johnson*, J., and the Grand Jury in the usual way for compensation; and the Grand Jury stated that the petitioners had required them to insert as part of the damage sustained the costs incurred by them in presenting and forwarding their petitions; that the Grand Jury had added these sums, but wished to call the Judge's attention to the fact before he fiated them, in order to ascertain how far these fees were legal. The fees were as follows; 4*s*. 7½*d*. charged on each

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FEES ON BURNING PETITIONS, ARMAGH.

petition by the clerk of the crown, and 5*s.* for the crier. The Grand Jury also stated that they considered that under the 4 G. IV. c 43, s. 1, the salary presented to the clerks of the crown and criers precluded them from taking any fees legally.

The crier insisted that his fees were immemorially received on such petitions, and the clerk of the crown relied on the 49 G. III. c. 101, as giving him the right to this fee; and both insisted that these were not fees coming within the meaning of the 4 Geo. IV. c. 43, inasmuch as they were not prior thereto sums for which any presentment could be made as fees by the Grand Jury; and that if the salary was intended by that Act to be in full of all fees of every description, the 4th section would be contradictory to the 1st, as thereby the public officers are required to make affidavit each half year of the fees by them received.

The learned Judge fiated the presentments, reserving the question put by the Grand Jury for the opinion of the Judges.

ELEVEN JUDGES (*Torrens*, J., being absent) unanimously ruled that the presentments should be fiated(*a*).

(*a*) In 1824, the Judges had decided as to the legality of this particular fee, in the case of *Criers*, as they included it in the schedule of fees which Criers might legally claim. See the case of *Criers' Fees*, *ante*, 33, and the *schedule*, *ante*, 35, note. The decisions upon the 4 G. 4, c. 43, are recognized as applicable to the present state of the law, under the 6 & 7 W. 4, c. 116. *Vide ante*, 33, note; and the cases of the *Fermanagh* and *Clare Road Traverses*, *post*.

Feb. 3, 1836.

IN the matter of JUDGES' ORDERS for the support of DESERTED CHILDREN.

Held, that under the 11 & 12 G. 3, c. 15, and 13 & 14 G. 3, c. 24, there could be only one order for a sum not exceeding £5 for each deserted child.

THE two following cases, involving the same question, were considered and decided together.

At the Summer Assizes for the County of *Armagh*, in 1835, a list of forty-three deserted children, with their respective ages, and the names and residences of the several persons in whose care they had been placed, was laid before *Johnson*, J. A memorial signed by the Rev. *Ogle Disney*, the curate of the parish of *Armagh*, and by *William Christian* and *George Barnes*, church wardens, in the following terms, was presented to the learned Judge. "To "the honorable *William Johnson*, Judge of Assize. The "undersigned, the curate and church wardens of the parish "of *Armagh*, beg to represent to your lordship that in "consequence of the determined opposition to the payment "of parochial assessments which has been manifested in "this parish, it has been found impossible to collect "the sums legally assessed by the parishioners at the "last Easter vestry. They are prepared to prove to "your lordship that acts of violence and intimidation have "been so successfully resorted to in the parish, that they "cannot find any person who will undertake the collection "of those assessments, though a high per centage has been "offered as an inducement. Under these circumstances "they pray your lordship to order an assessment to be "levied upon the parish of *Armagh*, for the support of "forty-three children who have been deserted by their "parents, or left orphans by their death. 24th July, 1835.

"Edward Ogle Disney, *Curate.*

"William Christian,
"George Barnes, } *Church Wardens.*"

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The Rev. *Ogle Disney* and *William Christian* were sworn, and deposed to the truth of the memorial and of the list of deserted children laid before the Judge. Mr. *Disney* also stated that a sum of £300 had been assessed at the preceding Easter by the parish in vestry for the support of deserted children, and that since that it had been found impossible to collect it; and Mr. *Christian* stated that he had used every exertion to collect the assessment, but found it impossible to do so in consequence of the excitement in the parish.

On considering the case, the learned Judge made an order that the sum of £198 19*s.* 3*d.* should be levied off the parish pursuant to the 13 & 14 Geo. III. c. 24, and that the same should be inserted in the levy warrant. But as applications to the court for the support of deserted children had of late been very much increased, apparently on account of the change that had taken place with respect to the Foundling Hospital, the learned Judge thought that it would be desirable for the Twelve Judges to look into the several statutes on this subject (viz. the 11 & 12 G. III. c. 15; 13 & 14 G. III. c. 24; 3 G. IV. c. 35, ss. 2 & 3; 6 G. IV. c. 102; 9 G. IV. c. 87), and to come to a determination under what circumstances and to what extent they were warranted, as the statutes then stood, to make orders to levy the same for the support of deserted children in those parishes against which such orders were sought.

At the Summer Assizes in 1835, several applications were made to *Burton*, J., in the Counties of *Leitrim*, *Roscommon*, *Sligo*, and *Galway*, by the ministers of different

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parishes, for orders to raise money for the maintenance and education of deserted children in those parishes, on the refusal of the parish vestries to make rates or parish cesses for them. In all these cases one sum of £5 had been raised by a former order, and in several of them more than one order had been made, and the amount raised under a conception that the statutes upon the subject (11 & 12 G. III. c. 15; and 13 & 14 G. III. c. 24) authorized the raising an annual sum of £5 for this purpose. It appeared to the learned Judge, however, that these statutes only authorised the making one such order, and he therefore reserved the question for the consideration of the Judges, in order that a uniform course might be taken for the future.

The learned Judge suggested that if the Acts in question authorized the raising of only one sum of £5, the provision must have been grounded on the presumption that the deserted child could be sent and admitted into the Foundling Hospital in *Dublin*; and as to this, the 1 G. IV. c. 29, authorized the governors with the approbation of the Lord Lieutenant to suspend or refuse the admission of any description of infants for any time, with or without any condition whatever. The 3 G. IV. c. 35, s. 1, recited the 11 & 12 G. III. and the 13 & 14 G. III, and that notwithstanding the provisions made by these Acts (viz. the allowance of a sum not exceeding £5 for each child) such children were brought to the Foundling Hospital in *Dublin*, and received therein from all parts of Ireland; and enacted, that no child should in future be admitted unless the sum of £5 should at or before the offering such child for admittance be paid to the Registrar of the Hospital, for the use of the Hospital; and that no child should be received who was not certified

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to be under the age of twelve months by the minister or curate and churchwardens; and the provisions of the 11 & 12 and 13 & 14 G. III. were thereby extended to parishes within the city of *Dublin*. The 6 G. IV. c. 102 (an Act to amend the laws respecting deserted children in Ireland), reciting the provision of £5 leviable on parishes for the support of each deserted child found therein, and that the sum of £5 was then required to be paid previous to the reception of any deserted child into the General Foundling Hospital in *Dublin*, and that no fund then existed to pay the expenses either of maintaining such deserted children in the parish where they were found, or of transmitting them to Dublin, enacted, that it should be lawful for the several parishes in Ireland to raise and levy such additional sum as might be necessary for maintaining such deserted children until admitted into the Foundling Hospital, and for transmitting them thither; with a proviso that no greater sum than fifty shillings should be raised in any one year for the maintenance or transmission. The Act to be in force for two years from its enactment. The 9 G. IV. c. 87, continued the last mentioned Act until the 25th of March 1829, and until the end of the then next session; but it was not continued by any subsequent Act.

ELEVEN JUDGES having met (*absente Torrens*, J.), NINE of them (*Bushe*, C. J. and *Foster*, B. *dissentientibus*) were of opinion that there could be only one order for a sum not exceeding £5 for each child, and not an annual order for each; and that the default of the vestry amounted to neglect by the parish. BUSHE, C. J., and FOSTER, B., agreed in thinking that the orders might be annual, as

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long as it was required by the minister or curate upon oath(*a*).

(*a*) The provisions of the 11 & 12 G. 3, c. 15, and the 13 & 14 G. 3, c. 24, are still in force in *Dublin*, to which they were extended by the 3 G. 4, c. 35. In other counties, the case of deserted children is provided for by the 6 & 7 W. 4, c. 116, s. 109; the intention of which enactment would seem to be to allow more than one order, for the child, when left exposed, must be under the age of *two* years, but no sum is to be presented for its support after it has attained *twelve* years. The 7 W. 4, c. 2, s. 7, extends the last-mentioned enactment to cases which had occurred previously.

Feb. 4, 1836. IN the matter of a JUDGE'S ORDER for the repay-payment of advances out of the Consolidated Fund for the support of the CARLOW District LUNATIC ASYLUM.

The Judge may make an order for the repayment of advances out of the consolidated fund, under the 6 G. 4, c. 54, s. 2, although the Assizes next after the order of council had been passed by.

BEFORE the Summer Assizes for *Carlow* in 1834, a sum of £89 10*s.* 7*d.* was advanced by the consolidated fund for the maintenance of ten patients from the City of *Kilkenny* in the District Asylum at *Carlow*, for the period comprized between the 20th of January and the 3rd of June, 1834, at the rate of £8 9*s.* 0½*d.*, being the same rate as was charged for patients from the Counties of *Kilkenny*, *Wexford*, *Kildare*, and *Carlow*. The usual order of the Lord Lieutenant and Council was laid before the Grand Jury; but they refused to present, on the grounds of its being an excessive demand, and having been previously rejected by the cess-payers and justices at the Special Sessions.

At the Spring Assizes in 1835, a sum of £105 1*s.* 2½*d.* was advanced from the consolidated fund for the mainten-

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ance of nine patients from the same city, at the same rate, for the period from the 3rd of June 1834, to the 10th of January 1835. The usual order of the Lord Lieutenant and council was laid before the Grand Jury, but they refused to present for the repayment of this advance for the same reasons as before assigned.

By the 6 G. IV. c. 54, (amending the 1 & 2 G. IV. c. 33) it was enacted (s. 1) that after any asylum shall be fit for the reception of lunatic poor, the Lord Lieutenant may order and direct any sum not exceeding £10,000 per quarter, to be issued out of the consolidated fund for the support of such establishment; and by s. 2, "That it shall "be lawful for the Grand Jury of any and every County, "County of a City, or County of a Town in *Ireland*, in or "for which, either wholly or in part, any such Asylum "had been or shall be erected, and such Grand Jury are "hereby required, at the Assizes *next after the date* of any "such order for the advance of money for the opening, "carrying on, or maintaining any such asylum, *or as soon* "*after as they shall be thereto required*, and from time to "time, whenever the case shall happen, to make a present-"ment for the raising off any such County, County of a "City, or County of a town, such sum or sums of money "as shall be necessary for the repayment of any such sum "or sums so advanced, or any part thereof, at such times "and in such proportions as shall be directed and ascer-"tained by any order or orders to be made by the Lord "Lieutenant or other chief governor or governors of *Ire-*"*land* in council as aforesaid; and if any such Grand Jury "shall neglect or refuse to make any such presentment, "the court shall order the sum or sums which ought to "be so presented to be raised, as if the same had been so

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"presented, and the same shall be raised and paid accord-"ingly."

At the Summer Assizes in 1835, the Crown-Solicitor having brought the matter under the consideration of *Joy*, C. B., his lordship ordered that the question as to the power of the Judge of Assize to make orders under this enactment for payment of *arrears* due upon advances out of the consolidated fund should be submitted to the twelve Judges.

NINE JUDGES (*Doherty*, C. J. C. Pleas, *Moore*, J., and *Torrens*, J., being absent), decided unanimously that the Judge of Assize was at liberty to make the order required by the statute for payment of the arrears, although the Assizes next after the date of the Lord Lieutenant's order for the advance had been passed by; and that the Judge ought to make such order for repayment upon the proper documents being laid before him(*a*).

(*a*) The 6 & 7 W. 4, c. 116, s. 93, now provides for the re-payment, by presentment, of advances from the consolidated fund; and instead of the words used in the 6 G. 4, c. 54, s. 2, it uses the expression "at each "assizes." But it does not provide for the case of the grand jury refusing to present, and therefore perhaps the provisions in the 6 G. 4, c. 54, s. 2, as to the *Judge's order*, are still in force.—The 91st and 93rd sections of the 6 and 7 W. 4, c. 116, refer to the Acts mentioned in the case in the text (1 & 2 G. 4, and the amending Act, 6 G. 4, c. 54,) as regulating the *Lord Lieutenant's* orders for advances.

IN the Matter of a PRESENTMENT for advances to CONTRACTORS in the County WICKLOW. *May* 25, 1836.

THE following resolution was agreed to by the Grand Jury of the County of *Wicklow*, subject to the approval of the Judge of Assize. "We hereby authorize the treasurer "in any case where the sum should exceed twenty pounds "presented at this Assizes, to advance to contractors from "any money in his hands applicable to such purpose, one "half of the cost of the said work, provided it shall be "certified by the surveyor that more than half of the cost "of said work has been expended, conformably to the con- "tract, and that due notice has been lodged with the "secretary of the Grand Jury, within the limited term for "lodging applications of the intention of such contractor "to apply for such advance, and that such advance shall "be approved at Special Sessions."

A presentment in the form of a *general* authority to the treasurer to make advances to contractors in every case where the sum should exceed £20, held not to be warranted by the 3 & 4 W. 4, c. 78, s. 49. (6 & 7 W. 4, c. 116, s. 128.)

This resolution was founded on the 49th section of the 3 & 4 Wm. IV. c. 78, and much discussion had taken place on the subject of it. Some members of the Grand Jury contended that no general resolution of the nature proposed could be passed, and that the section in question did not authorize it; other members argued that such general authority was necessary, as otherwise the section would be a nullity; and they particularly referred to the three separate conditions set forth in the section as necessary to be performed before any contractor could get the moiety of the cost of the work contracted for by him; one of those conditions being the approval of the justices at Special Sessions subsequently to be holden; which would guard the general

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authority given to the treasurer in the first instance by the Grand Jury, from any abuse(*a*).

Doherty, C. J. C. Pleas (the Judge of Assize), respited the presentment until he should have an opportunity of ascertaining whether, in the opinion of the Judges, such a presentment ought to be fiated.

Eleven Judges (*Pennefather*, B., being absent) decided unanimously against the presentment.

(*a*) This condition is omitted in the 6 & 7 W. 4, c. 116, s. 128.

May 25, 1836. IN the matter of TRAVERSES to Presentments for ROADS in the Co. KILKENNY.

Held, that the notice of traverses directed to be given by the 3 & 4 W. 4, c. 78, s. 55, *previous to the commencement of the Assizes*, should be given previous to the swearing of the grand jury for fiscal business. Such traverses, when entered too late at one Assizes, cannot be tried at the next.

At the Spring Assizes for the County of *Kilkenny*, in 1836, the following order was made by *Johnson*, J., on several road traverses for damages which had been entered at the Summer Assizes in 1835:—"Respite the trial of "these traverses for the opinion of the Judges upon the "point, whether the notice to the secretary of the Grand "Jury was sufficient, the Grand Jury for fiscal business "having been sworn on the 22nd of July last, the notice "served on the following day (the 23rd), and the commission "opened on the 24th, the next day."

Several road traverses for damages having been entered in the crown book for trial, the learned Judge was applied

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ROAD TRAVERSE, CO. KILKENNY.

to in court to strike out such traverses, on the ground that notice had not been given pursuant to the 55th section of the Grand Jury Act then in operation (3 & 4 Wm. IV. c. 78) to the secretary of the Grand Jury, previous to the commencement of such Assizes, stating the amount of damage intended to be claimed. The impression of the learned Judge at the time was, that "previous to the Assizes" should be construed to be "previous to the Grand Jury being sworn" on the discharge of their fiscal duties; because it might happen that if the Grand Jury, at the time of entering into the consideration of such presentment, were apprized of the number of traverses to be taken and the amount of the sums sought to be recovered, they might not have considered it advantageous to the County to pass such presentment; whereas if they were not aware of any such intention to traverse, or the amount of the damage sought to be obtained, they might pass a presentment which they would not otherwise have done. The learned Judge therefore respited the trial of these traverses until the opinion of the Judges should be taken upon the following points: first, whether the words "previous to the commencement of the Assizes" as used in the Grand Jury Act, meant "previous to the day on which "the Grand Jury are sworn on the discharge of their "fiscal duties;" and secondly, if such were the meaning, whether the entered traverses could be tried at the next Assizes before a petit jury to ascertain the amount of the damages?

Eleven Judges (*Pennefather*, B. being absent) having met, NINE of them were of opinion that both questions should be answered in the negative. TORRENS, J.

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and CRAMPTON, J. held that the traverses might be tried(*a*).

(*a*) The 134th section of the 6 & 7 W. 4, c. 116, contains the same words as those in the 3 & 4 W. 4, c. 78, s. 55, respecting notice to be given to the secretary of the grand jury, "previous to the commencement of the Assizes," and therefore this decision is applicable to the present law. With respect to the other point, the section in question of the 3 & 4 W. 4, c. 78, and the 133d section of the 6 & 7 W. 4, c. 116, both provide that presentments shall be traversed only at the Assizes at which the presentments are made. The construction, therefore, to be put upon the word "traversed," in conformity with this decision, must include not only the entry, but the trial, of the traverse. See the case of the *Co. Down Presentment*, *ante*, 20.

May 25, 1836.

IN the matter of PRESENTMENTS for Officers of the GAOL of DROGHEDA.

Where the magistrates and cess-payers at a Special Sessions under the 3 & 4 W. 4, c. 78, had reduced the gaoler's salary from its former amount; *Held*, that the grand jury at the Assizes following had power under the 7 G. 4, c. 74, s. 64, (notwithstanding the 3 & 4 W. 4, c. 78, s. 69,) to present for the full amount of the former salary.

ON the 18th of February, 1836, previous to the *Drogheda* Assizes, *Bushe*, C. J. received the following letter from Major *Woodward*, inspector general of prisons.

"My Lord,

"I think it my duty to submit to your lordship that "the salaries of the officers in the prison of *Drogheda* "have been reduced at the special Sessions to an amount "which, as inspector general of prisons, I must report as "a totally inadequate remuneration for the services which "are to be performed. The salary of the governor has "always been extremely low, viz. £80 a year, late Irish "currency. It appears from his report to me that his "salary is reduced to £50 a year, that sum being charged "with the payment of one of the turnkeys, and that the "salaries of the other turnkeys, which were so unusually "low as £20 a year, are reduced to £10. It is quite "unnecessary for me to occupy your lordship's time with

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" any observations upon this reduction; if such reduction " can be made, all improvement in prison discipline must " be abandoned; the salary proposed for the governor being " totally inadequate to the support of an officer qualified " for his office, while that proposed for the turnkeys could " scarcely be supposed to be sufficient to procure the ser- " vices of a person who could with safety be trusted " within the goal. I did hope that the salaries of our " officers were exempted from the provisions of the Grand " Jury Act by the 62nd section of that Act. I have the " honor to be, &c."

On the 23rd of February, at the *Drogheda* Assizes, the governor of the gaol handed to *Bushe*, C. J. the following letter:

" To the Lords Justices of Assize for the North East " circuit of Ulster. The petition of *Patrick M'Kenna*, gover- " nor of his Majesty's Gaol at *Drogheda*, sheweth, that the " cess-payers at the last special Sessions held under the " 3 & 4 Wm. IV. c. 78, and contrary to the wishes of the " magistrates thereat assembled, reduced the salary of " petitioner from £73 16*s.* 11*d.* being the lowest in Ireland, " to £50, and that of the turnkeys from £20 to £10 per " annum, charging petitioner's salary with the payment of " one of them. That on the assembling of the present " Grand Jury, petitioner addressed to them a memorial, " complaining of the gross injustice of the proceeding and " praying their interposition in this behalf, to which " petitioner would respectfully refer your lordships; that " the Grand Jury appeared most willing to administer " the redress sought, but not considering themselves " warranted by the law to alter the acts of the special

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" sessions agreeably to petitioner's prayer, they suspended " their decision upon it, referring the case to your lordships' " disposal; for the truth whereof petitioner would most " respectfully refer to the foreman. May it therefore " please your lordships to give such advice and direction " in the premises as to your lordships' wisdom and justice " shall seem meet. PATRICK M'KENNA."

In the address of the learned Chief Justice to the Grand Jury, he stated to them the substance of both letters, and directed them to make two sets of presentments, one for the sums which they thought proper salaries for the governor and turnkeys of the gaol, and the other for the sums which had been fixed at Sessions for these officers; and for the purpose of bringing all the facts before the Judges, his lordship enquired from the secretary of the Grand Jury as to what had passed at the Sessions, and found that the sums now claimed by the officers for the half year ending with the Spring Assizes for 1836, were those which had been heretofore presented, and that the magistrates wished to continue them, but were out voted by the rate-payers, who from the small extent of the County, and the burdens lately imposed on it, in consequence of the cholera and other charges, considered it their duty to be as economical as possible. The particulars of the proceedings at the Sessions were stated as follows in a paper handed by the secretary of the Grand Jury to *Bushe*, C. J. at the close of the Assizes.

" Lent Assizes, 1836, County of the town of *Drogheda*.
" At a special Sessions held preparatory to these Assizes,
" the governor of the gaol applied to the magistrates and
" cess-payers for his salary, as required by the 3 & 4 W. IV.

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" c. 78, s. 69, and the decision on his application was " ' approved; half yearly salary to be £25.' The turn- " key also applied, and the decision in his case also was " ' approved; half yearly salary to be £5.' The salary " of the governor theretofore was each half year £36 18 5½, " and that of the turnkey £10; and these would have " become due at the present Assizes. The Grand Jury " have made the following presentments in connection " with this case;—' We present the sum of £36 18 5½ " ' to be raised off this county, and paid to *Patrick* " ' *M'Kenna*, governor of the Gaol, for half a year's salary " ' ending these Assizes;' and a presentment for £25 for " ' the like purpose agreeably to the decision at Sessions. " ' We present the sum of £10, to be raised off this " ' county, and paid to the turnkeys for half a year's salary, " ' ending these assizes;' and a presentment for £5, for " the like purpose, agreeably to the decision at sessions."

As it did not appear that the 62nd and 69th sections of the 3 & 4 W. IV. c. 78, were easily reconcileable with the 64th sect. of the 7 G. IV. c. 74, the learned Chief Justice reserved for the consideration of the Judges the question, whether the Grand Jury were at liberty to present for the larger sum, notwithstanding the decision at the special Sessions.

ELEVEN JUDGES (*Pennefather*, B. being absent) unanimously decided in favour of the larger presentment(*a*).

(*a*) This decision will apply equally well to the present state of the law under the 6 & 7 W. 4, c. 116; s. 124 of which refers to the 7 G. 4, c. 74, as regulating presentments to officers of gaols, and also requires application to the Special Sessions.

May 25, 1836. THE KING *v.* STEPHEN ABBOTT DWYER.

An indictment for sending to the Lord Lieutenant a false recommendation of persons convicted, charged that the prisoner forged the signature of "*T. King*, Rector of *T.*" The evidence was, that the name forged by the prisoner was "*T. Knox*, Rector of *T.*" The Judge having given leave to amend, by substituting "*Knox*" for "*King*;" *Held* that there was no fatal variance on the ground of its appearing in evidence that *T. Knox* was in fact Rector of A., and that there was no such parish as that of T. *Held*, also, that proof of the document which contained the false recommendation being in the prisoner's handwriting, and dated in the county in which the venue was laid, was sufficient evidence of acts done in that county.

To prove a conviction which took place at a *former* Assizes, the record thereof, and not the crown book, is the best evidence.

THE prisoner was tried before *Johnson*, J. at the Spring Assizes for the County of *Tipperary*, in 1836, upon an indictment which stated that *John Hanny* and *Patrick Connors* had pleaded guilty at *Clonmel* Summer Assizes in 1835 to an indictment charging them with the manslaughter of *Patrick Ryan*, for which they were sentenced to transportation for seven years; that on the 13th of August in the same year, at *Clonmel*, a certain memorial, purporting to be a memorial on behalf of said *John Hanny* and *Patrick Connors*, and addressed to his Excellency the Lord Lieutenant, was prepared and written to be sent to his Excellency, praying a commutation of said sentence; that afterwards, at the said time and place, *Stephen Dwyer*, late of *Toomavara*, in said county, yeoman, knowing the premises, and intending corruptly, &c. to obstruct justice, and to deceive the Lord Lieutenant, and to cause him to believe that the said *John Hanny* and *Patrick Connors* were deserving of such commutation, and that same was recommended by one *Thomas King*, clerk, rector of *Toomavara* in said county, and by the Rev. *John Meagher*, Roman Catholic priest of said parish, and that the prosecutors (naming them) believed said persons to be innocent, did forge and counterfeit at foot of said memorial certain recommendations, certificates, and declarations, in the words following: (here the recommendations were set out; the first dated the 13th of August, 1835, at *Tooma-*

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vara, and purporting to be signed by *John Meagher*, P. P. of *Toomavara*, and by *Thomas Knox*, rector of *Toomavara*, and the other purporting to be signed by *Ellen Ryan*, *Denis Mack*, and *John Shanahan*, and purporting to be witnessed by *John Meagher*, P. P. of *Toomavara*, near *Nenagh*:) with intent that said forged certificates, recommendations, and declarations, should be presented to the Lord Lieutenant as true and genuine, with intent to procure a commutation of said punishment; and in further prosecution of said intent did cause said memorial with the said certificates and recommendations forged therein, to be sent to the said Lord Lieutenant. There was a second count differing from the first only in reciting the recommendations of the Rev. *John Meagher*, and the Rev. *Thomas Knox*, alone; and there was also a second indictment, differing from the first by leaving out the fact that the memorial was sent to the Lord Lieutenant.

The conviction of *John Hanny* and *Patrick Connors*, as set out in the indictments, was proved by *James Carmichael*, deputy clerk of the crown, who produced the record thereof. The memorial, recommendations, and the respective signatures, were distinctly proved to be the handwriting of the prisoner, and the admission of the prisoner to such effect was also proved. The several persons whose names appeared signed to the recommendations were produced, and respectively proved that the signatures purporting to be theirs' were not written by them. This was the evidence on the part of the Crown.

The indictments having in the reciting parts (as above set forth) stated the name of one of the persons recommending the commutation of sentence to be *Thomas King*,

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clerk, rector of *Toomavara*, and in setting out the recommendation, stated it to be signed by *Thomas Knox*, clerk, rector of *Toomavara*; the counsel for the crown during the progress of the trial applied to the learned Judge to amend the indictment by striking out the name *King*, and inserting instead thereof the name *Knox*. The learned Judge did so accordingly; and the following objections were taken by the counsel for the prisoner:

1st. That by the said indictments he was charged with having forged as signature to a certificate annexed to a memorial the name of "*Thomas King*, rector of *Toomavara*," and by the evidence it appeared that the name signed by the certificate was "*Thomas Knox*, rector of *Toomavara*;" and that such was a fatal variance. 2nd: That on the words *Thomas King* being amended in pursuance of the statute in such case made and provided(*a*), and *Thomas Knox* substituted, still the addition laid in the indictment, of "rector of *Toomavara*," was a fatal variance, said *Thomas Knox* by the evidence appearing to be rector of *Annameadle*," and there being no such benefice as *Toomavara*, and that such indictment, if right at all in setting out such false addition, should have set it out as "purporting to be" rector of *Toomavara*, not as being so in reality, there being no such parish. 3rd: That the record of the conviction of *Patrick Connors* and *John Hanny* should have been set out in the indictments, and that no proof whatever was given or offered by the crown of the identity of such persons, or of their being in existence at the date of the memorial, or of the trial. 4th: That the venue was laid in the County of *Tipperary*, and no evidence given by the Crown of any act done by the prisoner in said

(*a*) 9 G. 4, c. 15.

County, and no evidence given of the receipt by the Lord Lieutenant of the said memorial, or of its ever having been transmitted, uttered, or published by the prisoner or any other person in the said County or elsewhere. 5th: That the only evidence given of the conviction of the said *Patrick Connors* and *John Hanny* was the record thereof, whereas the proper and the legal evidence in the case would have been the crown book, and that the same should have been proved.

The learned Judge left the case to the Jury on the evidence, and they convicted the prisoner; but sentence was respited in order to submit the several objections to the Judges for their opinions.

ELEVEN JUDGES (*Pennefather*, B. being absent) unanimously overruled all the objections, and held that the conviction was right.

Nov. 23, 1836. IN the Matter of a PETITION for Compensation for Loss sustained by HIGHWAY ROBBERY.

Held, that petitions for compensation for losses sustained by highway robbery were not within the 3 & 4 W. 4, c. 78, s. 70.

JEREMIAH FLYNN, on the 13th of February, 1836, was robbed on the highway of £172 8*s.* 6*d.*, the property of his master, *William Jackson.* The latter prosecuted the robber to conviction, and preferred a petition for compensation under the 3 and 4 Wm. IV. c. 78, s. 70, which enacted, "That in all cases of maliciously burning, &c., or of "the robbery, burning, taking, destroying, or otherwise "injuring, of any corn, turf, merchandize, store-boat, barge, "vessel, or other property," the Grand Jury, on a petition being presented to the Judge of Assize, and other preliminaries complied with, should present compensation for the damage done. The Grand Jury accordingly made the following presentment: "We present the sum of £172 "8*s.* 6*d.* to compensate *W. Jackson* for a loss sustained "by highway robbery, believing that we are constrained "so to do by the 70th section of the 3 and 4 Wm. IV. "c. 78; but we should have rejected it, had it not "been under this belief. To be raised on the county at "large."

FOSTER, B. (the Judge of Assize,) suspended fiating this presentment until the opinion of the Judges should be obtained upon the question, whether the case of loss by highway robbery was within the 3 and 4 Wm. IV. c. 78, s. 70?

TEN JUDGES (*Moore*, J., and *Perrin* J., being absent,)

were unanimously of opinion that the case of highway robbery was not within the Statute, and that the presentment should be nilled(*a*). 1836. ROBBERY PETITION.

(*a*) This case, although it did not arise upon the *present* Grand Jury Act, has been inserted in this collection, because it appears to be very doubtful whether, and how far, some of the provisions of the 3 & 4 W. 4, c. 78, (the *late* Grand Jury Act,) may not be considered as still in force. With respect to the section in question, (3 & 4 W. 4, c. 78, s. 70,) the corresponding enactment in the 6 & 7 W. 4, c. 116, s. 135, omits the word "robbery," and the words "other property;" and also omits the provisions respecting the *petition* to the Judge of Assize; and, therefore, the question may arise, whether a petition to the Judge in case of "robbery of other property," might not still be offered. The 3 & 4 W. 4, c. 78, s. 70, had been held to repeal all former laws on the subject of malicious injuries to property (*Carlow Presentment, ante*, p. 180); and there has been no express repeal of the 3 & 4 W. 4, c. 78. The *implied* repeal of it, on the ground of inconsistency with the 6 & 7 W. 4, c. 116, would seem (as far as the present question is concerned,) to extend only to the case of *presentments* authorized by the former Act; the 6 & 7 W. 4, enacting, (s. 1,) that presentments are to be made under no other Act than the latter. It may be observed, that the section in question (3 & 4 W. 4, c. 78, s. 70,) is mentioned in *Oulton's* Index as still in force. (2d Ed. p. 486.)—(*Vide ante*, 72, note.)

THE KING *v.* JOHN CASEY and SARAH M'CUE.

Feb. 1, 1837.

Where there was no other corroboration of the testimony of an accomplice with respect to the person of one of the prisoners, but the evidence of the accomplice's wife, who herself appeared to be implicated in the guilt of the transaction; *Held*, that the Judge was right in not directing an acquittal, but in leaving the case to the Jury with observations upon the general objections to the credit of those witnesses; and that a conviction under these circumstances was good.

AT the Commission for the county of *Dublin*, in January, 1837, *John Casey* and *Sarah M'Cue* were tried before *Burton*, J., upon one indictment, which charged *John Casey* with breaking and entering the dwelling-house of *Anthony Richard Blake*, and feloniously taking in the house a quantity of silver and other articles (therein specified,) the goods of the said *Anthony Richard Blake*; and *Sarah*

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M'Cue with feloniously receiving several of the said stolen articles, she well knowing them to have been stolen.

The case against the prisoners was proved by *Henry Kirwan*, (an accomplice,) who gave a very detailed and particular account of the manner in which the robbery was effected, the stolen silver articles sold to the prisoner *Sarah M'Cue*, and the division of the purchase money made in her presence, and with her participation and full knowledge of the robbery; so that if credit could properly be given to his evidence, it became impossible to entertain any doubt whatever of the guilt of both the prisoners. Many of the particulars, as to the manner in which the robbery was committed, and part of the stolen goods disposed of, were also confirmed by other evidence; but those circumstances did not apply to the prisoners. As to them, the following evidence was given. *Mary Kirwan*, wife of *Henry Kirwan*, (the accomplice,) proved the sale of the stolen property to *Sarah M'Cue* by the prisoner *Casey*, and *Henry Kirwan* her husband, and the division made of the money. On her cross-examination she stated, that she did not know of her husband's intention to commit the robbery, but she had no doubt, when he was sent for and went with the prisoner *Casey* to meet a person of the name of *Heslip*, that he was going upon business of that nature; and she also admitted that she herself received some of the stolen articles from her husband and the prisoner *Casey*, and pawned them at the different offices where they were found; and those articles were produced and identified. Another witness, (*Mary Neil*, who with her husband kept a baker's shop in *Fish-amble-street*,) was also examined; and she proved, that very shortly after the time of the robbery, *Sarah M'Cue* came to her, and gave her several silver articles (of the descrip-

tion of those that were stolen) to take care of for her, and amongst them a silver spoon, and that in two or three days after *Sarah M'Cue* called upon her again in a great hurry to get them back; that she gave them back, with the exception of one (the silver spoon), which was identified and proved to be one of the stolen articles. Upon this witness's cross-examination, she admitted that she was well acquainted with *Sarah M'Cue*, who often brought articles to her to take care of for her, and that she believed at the time she received the articles in question, that they were not honestly come by.

On the case for the prosecution being closed, *Mac Donogh*, for the prisoners, contended that the Jury should be told that they ought to acquit the prisoners. He admitted the consistency of the narrative of the accomplice (*Henry Kirwan*) in itself, and as compared with the other evidence in the case, so far as respected the commission of the offence; and that it might and ought to be considered as incontestably proved that the robbery was committed by him (the accomplice), and the stolen property afterwards disposed of by him; and that it was reasonably to be inferred from the whole of the evidence, that in this he was assisted by other persons, and that there were receivers, or a receiver, of the stolen goods, with the guilty knowledge of their having been stolen; but that there was no evidence that could be safely relied upon that the prisoner *Casey* was a party to the commission of the larceny, or that the prisoner *Sarah M'Cue* was a receiver of any of the stolen goods. He laid down these propositions—1st. That the evidence of an accomplice is not to be acted upon (as respects the alleged guilt of a prisoner), unless that evidence has some confirmation or corroboration by other evidence.

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2nd. That such corroboration or confirmation, in order to warrant the acting upon it, must have a specific application to the prisoner on trial. 3rd. That the evidence of another accomplice, or of the wife of an accomplice, is not to be considered or acted upon as any evidence of confirmation or corroboration. 4th. That in the absence of any such (unobjectionable) evidence of confirmation or corroboration, the jury should be told by the Judge that they ought to acquit the prisoners. In support of these propositions he cited the following cases:—*Rex* v. *Wells*(*a*); *Rex* v. *Neal*(*b*); *Rex* v. *Addis*(*c*); *Rex* v. *Webb*(*d*); *Rex* v. *Moores*(*e*); *Rex* v. *Wilkes*(*f*); *Rex* v. *Noakes*(*g*). With respect to the case of *Rex* v. *Birkett and Brady*(*h*), he contended that it did not appear to have been reserved or considered in such a manner as to make it a binding authority; and that all the cases above cited were subsequent to it. He then insisted that under the authorities, the evidence of *Mary Kirwan* could have no weight, she being both the wife of an accomplice, and an accomplice herself, as accessary after the fact. That there was no other evidence (of corroboration) applicable to the prisoner *Casey*, and that the only evidence of corroboration applicable to the prisoner *Sarah M'Cue* was that of *Mary Neil*, who was herself to be considered as an accomplice or accessary after the fact; and on this point he referred to *Rex* v. *Davis*(*i*), and *Rex* v. *Richardson*(*k*).

Maziere Brady, on the part of the crown, referred to 2

(*a*) Mood. & M. 326.
(*b*) 7 C. & P. 168.
(*c*) 6 C. & P. 388.
(*d*) 6 C. & P. 595.
(*e*) 7 C. & P. 270.
(*f*) 7 C. & P. 272.
(*g*) 5 C. & P. 326.
(*h*) Russ. & R. 251.
(*i*) 6 C. & P. 177.
(*k*) 6 C. & P. 336. (*Taunton J.*)

Russell on Crimes, 559, and the cases there cited; and to the Treatise of *Joy*, C. B., on the evidence of accomplices, and the cases there cited.

The learned Judge told the prisoners' counsel that he could not take the case from the jury, and that he should sum up the evidence to them; but that counsel was at liberty to address the jury upon the case. *Mac Donogh* accordingly spoke to the case at considerable length, and in the course of his address he referred to, and read and commented upon, the cases he had before cited. No witnesses were produced for the prisoners.

In summing up the case to the jury, the learned Judge read the whole of the evidence to them, commenting upon the bearing of its different parts. He told them that the demeanor of the witnesses *Henry* and *Mary Kirwan*, and *Mary Neil*, the consistency of the narrative of each with itself, and with that of the others, and the corroboration and confirmation it received as to many of the circumstances collateral to the alleged actual guilt of the prisoners, appeared to give the case, as deposed to by them, a character of probability that might probably create a strong impression upon their minds of the truth of that evidence as it went to affect the prisoners. He cautioned them against yielding implicitly to that impression, observing not only on the general objections to their credit as being accomplices in, or accessaries to, the offences which they deposed to, but also on the inference (which appeared to the learned Judge to be fairly deducible from their evidence) that their general habits were those of being concerned in such depredations as were the subject of the indictment. He told them also distinctly, that they ought not to find a verdict against

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the prisoners if they entertained a reasonable doubt of their guilt, and that it was not enough that they should feel a persuasion in their own minds of that guilt, but that they must be satisfied that it was proved to them, and that by witnesses who deserved credit for the truth of the evidence given by them, as that evidence went to affect the prisoners. But the learned Judge did not direct the jury to acquit, nor tell them that in his opinion they were bound or that they ought to acquit the prisoners, or either of them; but he left the objections to the witnesses' credit (explaining to them the grounds of those objections) to their consideration.

The jury, who had appeared to give great attention to the evidence, to the observations made to them by the prisoners' counsel, and to the charge of the learned Judge, on the case being closed, immediately and without any hesitation found both the prisoners guilty.

The learned Judge, although he concurred with the jury in thinking the prisoners guilty, told the prisoners' counsel that he should bring the case before the Judges for their consideration; in order that if it should be their opinion that he ought to have told the jury to acquit the prisoners, or that under all the circumstances the conviction was not so satisfactory as that the prisoners ought to undergo their sentence, he might recommend them to government for a pardon.

THE TWELVE JUDGES were unanimously of opinion that the conviction was right(*a*).

(*a*) Vide *Rex* v. *Sheehan*, *ante*, 54.

THE KING *v.* RACHAEL SHANNON.

May 24, 1837.

An indictment charged an attempt to poison by mixing a certain noxious and destructive thing called *sugar of lead*, with flour, and administering the said poison so mixed with flour. The Jury found the prisoner guilty, but stated that they could not say what particular kind of poison had been mixed up with the flour. *Held*, that the conviction was good.

The prisoner in this case was tried before *Richards*, B., at the Spring Assizes for Cork, in 1837, for an attempt to poison *Mary Hickey*, by administering to her poison mixed in flour, and made into a cake by the prisoner. There was but one count in the indictment, which was as follows: "That she, *Rachael Shannon*, wilfully, maliciously, feloniously, and unlawfully, did mix and mingle certain "poison, to wit, a quarter of an ounce of a certain noxious and destructive thing *called sugar of lead*, with flour, "and the said poison so mixed with flour as aforesaid, to "wit, on the 27th of February in the year aforesaid, at "*Bandon*, in the said County of *Cork*, wilfully, &c. did "administer to, and cause to be taken by, the said *Mary* "*Hickey*."

The case for the prosecution was clearly proved against the prisoner, except only with regard to the particular description of poison used; and upon that subject there was no satisfactory evidence, the fragments of the cake having been thrown aside and lost in the confusion that took place in Mrs. *Hickey's* house upon her sudden and alarming illness; and although she and the other persons who had partaken of the cake and were affected by it, were attended by a medical man, he did not for some reason or other take the precaution of analyzing the matter thrown off the stomachs of his patients. He, however, stated that he was of opinion that the poison could not have been sugar of

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lead, but said he was unable to say what the particular description of poison was that had been used.

Under these circumstances the counsel for the prisoner insisted that the learned Baron should direct the jury to return a verdict of not guilty, inasmuch as there was no evidence (as they contended) to sustain that part of the indictment that charged the prisoner with having administered sugar of lead to *Mary Hickey*, or at least that his lordship should direct the jury to acquit the prisoner unless they should feel satisfied upon the evidence that the poison or noxious matter mixed with the flour, by the prisoner, was the same as that described in the indictment, viz., sugar of lead. The learned Baron, however, in charging the jury, told them that if they believed the evidence for the prosecution, and were of opinon that the prisoner did knowingly, wilfully, and maliciously mix in the cake any kind of poison or poisonous matter calculated to take away life, and intended thereby to take away the life of *Mary Hickey*, they should find the prisoner guilty, though they should not be able to make up their minds whether the particular poison so made use of was that described in the indictment or not.

The jury brought in a verdict of guilty, but upon delivering in their verdict, they stated to the court that they were unable to say what particular kind or description of poison it was that had been mixed up in the flour by the prisoner; and they added, that if the indictment could only be sustained upon their finding the poison to be sugar of lead, they would not have felt themselves warranted, upon the evidence, in bringing in a verdict of guilty against the prisoner. Under these circumstances (having recorded

sentence of death against the prisoner) the learned Baron reserved the point raised by the prisoner's counsel, for the consideration of the Judges. 1837. REX v. SHANNON.

ELEVEN JUDGES (*Doherty*, C. J. C. Pleas, being absent), unanimously held that the conviction was right.

In the Matter of PRESENTMENTS for CORONERS in the County of CAVAN. *May* 24, 1837.

AT the Spring Assizes for the County of *Cavan*, in 1837, when *Bushe*, C. J., was passing the presentments for the County at large, the Grand Jury called his lordship's attention to the numbers 12, 13, 14, and 19 in the schedule, as they came to them from Sessions. They were all founded on applications from Coroners, accompanied by inquisitions held by each, and they were all endorsed "approved at Sessions, *H. Maxwell*, chairman." Numbers 14 and 19 specified the sums for which the presentment was to be granted; numbers 12 and 13 had blanks for the sums; number 12 in the printed schedule was for one inquest less than was claimed, as appeared by comparing it with the

A person who acts as a coroner merely within the limits of a borough, is a coroner within the meaning of the 6 & 7 W. 4, c. 116, s. 97, so as to entitle him to a presentment.

The *maximum* presentable for *each* coroner, under the 6 & 7 W. 4, c. 116, s. 97, is £2 for each inquest, even although that should exceed £30.

The *maximum* presentable for all the coroners in the county of *Cavan*, is £90.

Where £90 is the maximum presentable for all the coroners of a county, if the number of inquests has been such that a payment of £2 for each inquest would make a sum exceeding £90 in the whole, then each coroner is to abate according to his number of inquests, until the sum is reduced to £90.

Where the magistrates at Sessions left blanks in some of the numbers in the schedule relating to presentments for coroners, on account of doubts which they felt as to the sums to be inserted: *Held*, that it was competent to the Grand Jury to fill up those blanks, after having been advised by the Judge; notwithstanding the 6 & 7 W. 4, c. 116, s. 47.

Quære, whether the *maximum* presentable for all the coroners of a county is to be regulated by the number of coroners allowed by schedule S of the 6 & 7 W. 4, c. 116, or by the *actual* number of coroners, where that number is less than the schedule of the Act allows?

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manuscript, which showed that the case was investigated at Sessions.

The Secretary of the Grand Jury informed *Bushe*, C. J., officially, "that the reason why the Bench at Sessions did "not name any fixed sum for each of the coroners in those "numbers was, that they entertained doubts as to the law, "and wished that the Grand Jury might use their dis-"cretion in allocating such sums as they might think fit, "with the consent of the Judge of Assize." He and the Grand Jury also informed the Court that *William Burrowes* acted as coroner merely within the limits of the jurisdiction of the borough of *Cavan*, and that the practice had theretofore been, for more than 20 years past, to present to him, pursuant to the Coroners' Act, for each inquest held by him within the borough; and that there were no other coroners in the county except Mr. *Cottingham* and Mr. *M'Fadden*, the applicants in Nos. 12 and 13.

The charter of King James I. incorporating the Borough of *Cavan*, was produced, by which the sovereign is appointed "*ex-officio* Coroner for the Borough, that is, one "mile around, and no other Coroner to intermeddle."

The respective numbers in the schedule were in the following words:—No. 12.—"4 G. IV. c. 43; 5 G. IV. c. 93; "and 6 & 7 W. IV. c. 116, s. 97. To *John Cooper Cotting-*"*ham*, Esq. one of the Coroners for said County, for holding "22 inquests in this County previous to 1st Nov. 1836, and "9 inquests since; in all 31 inquests since last Assizes; "£———." No. 13, *ibid.*—"To *John M'Fadden*, Esq. "one of the Coroners for said County, for holding 9 in-"quests previous to 1st of November, 1836, and 7 in-

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" quests since, in that County; in all 16 inquests since " last Assizes; £———." No. 14, *ibid.*—" To *William* " *Burrowes*, Esq. vice-sovereign and Coroner of *Cavan* " Borough, for holding 2 inquests in said borough pre- " vious to 1st of November, 1836, 3 ditto since, in all " 5 inquests, since last Assizes; £16 10*s.*" No. 19.— " 4 G. IV. c. 43, 5 G. IV. c. 93; and 6 & 7 W. IV. c. 116, " s. 97. To Surgeon *Coyne* for attending and giving evidence " on an inquest held in the Half Acre, *Cavan*, by order of " *William Burrowes*, Esq. £2 2*s.*"

Upon these facts and documents the Grand Jury told *Bushe*, C. J., that they found some difficulty in construing the late statute 6 & 7 W. IV. c. 116, s. 97, upon which conflicting opinions were entertained; and required his lordship's advice upon the following questions:—1st, whether the Grand Jury were at liberty to fill up the blanks left by Sessions in numbers 12 & 13, their functions being confined by s. 47 of the late Act, to approval or rejection of what is done at Sessions. The learned Chief Justice told them, that in his opinion, as the Sessions had exercised a judgment on those applications, and made a decision in point of merits, and had only left open a question of law upon the new statute as to amount, for the decision of the court at the Assizes, it seemed to him that it was competent to the Grand Jury, after being advised by the Judge, to fill up those blanks; but that as there were other questions which he must refer to the Twelve Judges, he should also refer that.

The second question was, whether Mr. *Burrowes* was a Coroner within the late Act of parliament so as to entitle him to a presentment. With respect to this question, it

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was material to observe that the expressions, Coroner "for" the County, "of" the County, and "in" the County, were used indifferently, not only in the late Act, but in the preceding statutes relating to Coroners, viz., the 1 G. IV. c. 28; 3 G. IV. c. 115; and 4 G. IV. c. 43.

The third question was, whether, if Mr. *Burrowes* were not a Coroner, the *maximum* for the sum to be presented was to be calculated upon the number of actual Coroners, which on that hypothesis would be reduced to two; or upon the number (three) in the schedule referred to by s. 97; *i. e.* whether the sum was to be £90 or £60.

The fourth question was whether the maximum of the distributable fund to be apportioned by the Grand Jury was to be £30 for each Coroner, or two pounds for each inquest, even although that should exceed £30.

Accordingly as the Judges should decide the second question, the presentments in numbers 14 and 19 were to be fiated or nilled; and according to their decision on the third and fourth questions, the blanks in 12 and 13 were to be filled up with the proper sums as the act of the Grand Jury, if upon the first question the Judges should think that the Grand Jury had authority to do so.

ELEVEN JUDGES being present (*absente Doherty*, C. J. C. Pleas), they were all of opinion, upon the first question, that the Grand Jury were at liberty to fill up the blanks left at Sessions, after being advised by the Judge. Upon the second question, SEVEN Judges (BUSHE, C. J., JOY, C. B., JOHNSON, J., BURTON, J., PENNEFATHER, B., FOSTER, B., and RICHARDS, B.,) held that Mr. *Burrowes* was a

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Coroner within the meaning of the Act, so as to entitle him to a presentment. The remaining four Judges held that he was not. Upon the third question, EIGHT Judges (viz. the seven above enumerated, and CRAMPTON, J.), held that the sum of £90 was in the County of *Cavan* the *maximum* presentable. The remaining three Judges held that the sum of £60 was the *maximum*. Upon the fourth question the Judges held(*a*) that £2 for each inquest, even though it should exceed £30 in the whole, was the *maximum* presentable for each Coroner.

The result of the decision was, that Mr. *Burrowes* was a Coroner within the Act, and that each of the three Coroners was entitled *primâ facie* to £2 for each inquest held by him, which would altogether, in this case, amount to £104. This sum, however, exceeded, by £14, the *maximum* for the County of *Cavan*, and therefore each Coroner was to abate according to his number of inquests, so as to make the whole sum presented only £90. With respect to the third question, some of the majority rested their opinion (that £90 was the *maximum*) on the ground that three was the number of Coroners in the schedule to the Act, and others on the ground that three was the *actual* number of Coroners; but Mr. *Burrowes* having been held to be a Coroner, and the actual number being thus made equal to the number in the schedule, it became unnecessary to decide this point, as *quâcunque viâ datâ* £90 would be the *maximum*.

(*a*) Whether unanimously, or by a large majority, cannot precisely be stated.

May 24, 1837. IN the Matter of PRESENTMENTS to Clerks of the Peace for copying JURORS' BOOKS.

Since the passing of the 6 & 7 W. 4, c. 116, no presentments can be made to remunerate clerks of the peace for providing and copying jurors' books, and preparing precepts and returns, under ss. 5 & 9 of the Jurors' Act, 3 & 4 W. 4, c. 91.

The construction of the 6 & 7 W. 4, c. 116, s. 1, is, that no presentment can be lawful unless authorized by an enactment, or an express exception, in that statute.

At the Spring Assizes for the Counties of *Cavan* and *Fermanagh*, in 1837, presentments were offered to *Bushe*, C. J., by the foreman of the Grand Jury, in the former County for £3 10*s*., and in the latter for £10, to be paid to the respective clerks of the peace for each County, for providing and copying the Jurors' books for the year 1837, and preparing precepts and returns for the collectors to make out the same.

These presentments were said to be authorised by the 5th and 9th sections of the Jurors' Act, 3 & 4 W. IV. c. 91; but as it appeared to the learned Chief Justice that there were not any sections in the last Grand Jury Act, 6 & 7 W. IV. c. 116, warranting these presentments by the way either of enactment or exception, his lordship did not consider himself at liberty to fiat them. However, at the request of the officers interested, who represented it as a case of hardship, he reserved the question for the consideration of the Judges.

Ten Judges (*Doherty*, C. J. C. Pleas, being absent, *Joy*, C. B. *dissentiente*), decided against the presentment, upon the ground that the 1st section of the 6 & 7 W. IV. c. 116, renders void all presentments that are not supported either by an enactment or an exception in that statute.

IN the Matter of Presentments for MEDICAL OFFICERS in the Co. of MONAGHAN.

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Held, by six Judges against five, that the 6 & 7 W. 4, c. 116, s. 86, does not render it *imperative* upon the grand jury to make a presentment for the surgeon of the infirmary who tenders his services to the prisoners in the gaol, where there has been a surgeon previously appointed for the gaol by the grand jury, and paid by presentment.

At the Spring Assizes for the County of *Monaghan*, in 1837, two presentments were brought before *Torrens*, J., under the following circumstances:—

Dr. *Samuel M'Dowell* was appointed to the situation of surgeon to the county infirmary in the year 1800, and subsequently to that of surgeon to the county gaol, and continued to hold both appointments for several years, receiving a salary of £100 a year from government for the infirmary, and for the gaol £74 a year from the county, by presentment made under the statutes then in force. On the 16th day of July, 1833, he resigned the situation of surgeon to the county gaol, but retained that of surgeon to the infirmary. At the Summer Assizes of 1833, the grand jury then assembled, unanimously appointed his son, *John S. M'Dowell*, to be surgeon to the gaol in his place, under the 7 G. IV. c. 74, s. 72, and the usual salary was at each following assizes presented for him. On the 13th of November, 1836, Dr. *Samuel M'Dowell* also resigned the situation of surgeon to the county infirmary; and in the month of December following, the governors of that infirmary held an election, and Dr. *Young* was appointed. From the time that Dr. *Samuel M'Dowell* resigned the office of surgeon to the gaol in the year 1833, to the month of November, 1836, (during which time he continued surgeon to the county infirmary) he never received any salary whatever from the county, but merely the £100 a year from government.

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By the 6 & 7 W. IV. c. 116, s. 86, it was enacted, "That the grand jury of any county may present at each "assizes a sum not exceeding £47, to be raised off such "county, and paid to the surgeon of the infirmary thereof;" one of the requisites to be performed before such presentment can be made, being, "that such surgeon shall "have given his attendance and professional assistance, "without any other or further reward or fee, to the "prisoners and others in the gaol of the county to the "infirmary of which he has been appointed surgeon, "if such gaol is situate within five miles of such in-"firmary." Immediately after his having been elected surgeon to the county infirmary, Dr. *Young* went to reside in the town of *Monaghan*, entered into the discharge of his duties as the surgeon of the infirmary, and offered his services and professional assistance to the prisoners in the gaol, as required by the provisions of the foregoing Acts. His services would not be accepted, and the governor of the gaol refused to permit him to attend the prisoners, or give them his professional assistance. In consequence of this refusal Dr. *Young* addressed the following letter to the Governor and Board of Superintendence of the County of *Monaghan* gaol :—

"Gentlemen,

"Having attended on the 17th day of January inst. "at the County of *Monaghan* gaol, to afford my pro-"fessional services and assistance to the prisoners and "others within such county gaol, gratuitously and with-"out fee or reward from them, pursuant to the duty "imposed on me as surgeon to your County Infirmary, "by the provisions of the several statutes upon that

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" subject, I hereby inform you, that admittance for the " the above purpose was refused on that occasion, and " that I was prevented from rendering such professional as- " sistance and services; I therefore request that you will " have the goodness to give the necessary orders that I " shall have free admittance for the above mentioned pur- " pose. I will wait your answer, naming the day when I " may attend at the house of Mr. *George Moore*, in Glass- " lough-street.

" I have the honor to be, &c.,

" January 17, 1837. " A. R. YOUNG, M.D."

To this application the Board of Superintendence gave the following answer: " At a meeting of the Board of " Superintendence of the county *Monaghan* Jail,—Re- " solved, that having taken into consideration Dr. *Young's* " application, the board consider that they have not the " power to make any appointment to any office, unless in " case of such office becoming vacant between two assizes, " and that no such vacancy has in this case occurred; and " therefore they are not authorized in recognizing any " other medical attendant than the present.—Signed, &c."

At the Spring Assizes for the Co. of *Monaghan*, in 1837, Dr. *J. S. M'Dowell* applied to the grand jury for the presentment of his salary of £37, half yearly, as usual, which had been regularly presented to him at every assizes since his appointment, and the grand jury allowed the presentment. Dr. *Young* also applied at the same assizes for a presentment for £47, being one-half of the salary of £94, to which he sought to be entitled under the 6 and 7 Wm. IV. c. 116, and the grand jury, under the 86th section (Dr. *Young*, by his counsel, not seeking more), presented him a sum of £37.

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Torrens, J. respited both presentments, (*i. e.* Dr. *Young's* for the infirmary, and Dr. *M'Dowell's* for the gaol,) until he should have an opportunity of having the opinion of the twelve Judges on the following points:—First, whether it was imperative on the grand jury to present a sum at each assizes, not exceeding £47, to the surgeon of the county infirmary, provided he either attends or is willing to attend the prisoners in the gaol gratuitously, and without fee or reward? Secondly—Whether, if it were imperative on the grand jury to present a remuneration under the Statute to the Surgeon of the county infirmary, that presentment was to supersede the presentment which the surgeon to the gaol had applied for, or whether the county was to be burthened with the expense of two medical officers for the same establishment?

Neither neglect nor insufficient discharge of duty was ever imputed to either of the officers in question since their respective appointments. On the part of Dr. *M'Dowell*, (who was a physician and surgeon,) it was insisted that he having been legally appointed, and having duly performed all the duties of the situation, the grand jury, under the provisions of the several Acts of Parliament, and in particular of the 7 G. IV. c. 74, s. 72; the schedule to 4 G. IV. c. 43; 6 and 7 Wm. IV. c. 116, ss. 110 & 124; and 3 & 4 Wm. IV. c. 92, s. 6; were bound to present from time to time for his salary of £37 half-yearly. On the part of Dr. Young, it was represented, that having complied with all the necessary requisites required by these Acts of parliament, he had submitted his application for his salary as Surgeon of the county infirmary to the special sessions, held previous to the assizes; that his application was approved of, and a presentment grounded upon it was

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made by the Grand Jury in his favour for £37; and that the grand jury were *bound* to make a presentment in his favor as Surgeon to the county infirmary, in obedience to the provisions of the several statutes before referred to; that it appeared from these statutes, and especially from the preamble of the 54 G. III. c. 62, to have been the object of the legislature, to procure duly qualified persons who had been regularly educated for the profession of Surgeons, to fill the situation of Surgeons to the several county infirmaries throughout Ireland, and with that view to make it imperative on the grand juries to present a suitable salary for them; the Surgeons, as one of the considerations for such presentments, being obliged to give their attendance and professional assistance to the prisoners in the county gaol, without further fee or reward.

ELEVEN JUDGES having met (*Doherty*, C. J. C. Pleas, being absent) SIX of them (JOY, C. B., MOORE, J., JOHNSON, J., PENNEFATHER, B., BURTON, J., and TORRENS, J.) were of opinion, that the presentment to Dr. *Young*, the Surgeon of the infirmary, should be nilled; the remaining five Judges holding, that it should be fiated. ALL PRESENT held, that the presentment to Dr. *M'Dowell*, the Surgeon of the gaol, should be fiated.

June 7, 1837.

In the Matter of Officers' Fees upon ROAD TRAVERSES.

The fee of 5*s.* paid by the party traversing to the crier upon the trial of a road traverse for damages, is a lawful one, and may be received by him notwithstanding the 6 & 7 W. 4, c. 116, s. 110. But it is not to be included in the verdict as part of the damages sustained.

Quære as to the legality of a fee to the clerk of the crown under the same circumstances.

At the Spring Assizes for the County of *Fermanagh*, in 1837, several traverses for the damages occasioned by making new or widening old roads were tried before *Bushe*, C. J., on the last day of the Assizes; in the progress of which trials his lordship was informed by the crier that the traversers were each paying to him a fee of five shillings, being that to which previous to the 6 and 7 W. IV. c. 116, he had been entitled, and requested directions as to how he should act. The clerk of the crown also stated that he considered himself entitled to a fee of £1 4*s.* on each traverse, and that both his fee and the crier's were paid by the traversers, without objection. In support of his own claim he observed, that the 133d section of the Act did not apply to traverses for damages, but only to general traverses, such as for inutility or illegality, which, as being of a public nature, the legislature in that section encourages and protects, not merely by depriving the clerk of the crown of his fees, in respect of such traverses, but by enacting that the costs payable by a traverser defeated upon trial shall be paid by the county, if the Court shall be of opinion that there was reasonable cause for the traverse: whereas in the following section, (the 134th,) regulating traverses for damages occasioned by making or widening roads, which are proceedings for compensation by an individual, there is no prohibition against the clerk of the crown taking fees. Secondly, he insisted that the 110th section of the late Act must be interpreted as the former Act of 4 G. IV. c. 43, which is not repealed by the late Act except so far as the Acts

are inconsistent with each other; according to which statute the salaries, then for the first time given, were only in lieu of fees theretofore paid by presentment, which the fees in question never had been; and he called the attention of the Court to the 112th section, which recognizes the emoluments of his office as composed partly of fees, and also to the recent statute as having fixed the salary of the Clerk of the Crown at £230, British currency, which is less than what had been his salary under the 4 G. IV. c. 43.

The learned Chief Justice did not consider himself at liberty to make any summary order as to the claims of the Clerk of the Crown, for what he considered as his lawful fees, which he was at liberty to assert in such a way as he might be advised; but with respect to the Crier, his lordship thought it the proper course, (although no objection was made to the fee by the traversers) to take the opinion of the Judges, with a view to uniformity of practice. The fees received on this occasion were deposited with the Registrar, to be returned, if not considered legal, to the several traversers whose names appeared on the crown book.

The discussion of this case having taken place in the presence of the jury, *Bushe*, C. J. desired them not to include in their verdicts the fees so paid by the traversers, as had formerly been in some counties the practice; upon which they stated that that had not been the practice in the county of *Fermanagh*, and stated that their verdicts should be calculated exclusive of fees.

TEN JUDGES, (*Foster*, B., being absent, *Crampton*, J., *dissentiente*,) were of opinion that the fee in question must

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be considered a lawful one as long as the resolution of the Judges in the year 1824(*a*) remained unrescinded; and that being lawful, it was not taken away by the 6 and 7 Wm. IV. c. 116, s. 110. *Crampton*, J. *held*, that whether lawful or not, it was taken away. All present were unanimously of opinion that the fee could by no means be made a charge on the county, and ought never to be included by the jury in their verdict, as part of the damages sustained(*b*).

(*a*) *Ante*, p. 33.—It was stated, through an inadvertence, in the notes to that case, (pp. 33 and 35,) that s. 133 of the 6 & 7 W. 4, c. 116, prevented *criers* from taking fees on any road traverses except those for damages; but criers are not among the officers expressly named in that section.

(*b*) *Secus* as to fees on burning petitions, at least under the law previous to the 6 & 7 W. 4; see the case of the *Armagh Burning Petition*, *ante* 182.

See also the case of the *Clare Road Traverse*, *post*.

June, 1837.

IN the Matter of a PRESENTMENT to repay to Government sums due by a defaulting TREASURER in the County of TYRONE.

Where the treasurer of a county proved a defaulter to government in the repayment of advances made by the government to the county, (the amount of which had been presented by the grand jury, raised, and paid into the treasurer's hands,) and, after the government had sued him and his sureties upon their recognizances, there still remained a balance due: *Held*, that the grand jury were not bound to present for the deficiency, under s. 145 of the 6 & 7 W. 4, c. 116, and that the Judge on their refusal was not bound to make an order under s. 179 of that Act.

Semble, that the crown is not within s. 145 of the 6 & 7 W. 4, c. 116.

AT the Spring Assizes for the County of *Tyrone* in 1837, an application was made to *Moore*, J., to fiat a presentment, under the following circumstances.

It appeared that from the Spring Assizes in 1826 to the

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Spring Assizes in 1835, various presentments were made by the Grand Juries of the County of *Tyrone*, for the repayment of advances of monies by government for various purposes to and for that county, under various heads, viz :— constabulary police, building and repairs of the gaol of *Omagh*, bridewells, building and support of lunatic asylums, boards of health, and valuation of lands; and the several sums presented were levied and paid to the then treasurer, who had been elected on the 26th of June, 1826. It appeared, by an account furnished by the treasury in 1835, that large balances remained due to the government, unpaid by the treasurer, after giving credits for all payments made by him on the several accounts of advances under the heads before mentioned, viz :

1.—Constabulary Police, ...	£5489	9	4½
2.—Gaol of Omagh, ...	2415	4	10
3.—Bridewells, ...	37	0	0
4.—Lunatic Asylums, ...	2483	17	10½
5.—Boards of Health, ...	619	14	11½
6.—Valuation of Lands, ...	208	1	7
	£11253	8	7½

The treasurer, after his election, entered into security by recognizance as required by law, himself in £8000, and in two sureties in £4000 each. The government finding that payment of this large sum, or of any part of it, could not otherwise be procured, caused proceedings to be taken against the treasurer and his sureties on their recognizances, and the amount of the sureties' recognizances was recovered from them, viz : £4000 from each; but no sum could be levied as against the treasurer himself. Writs of *levari*

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were issued against him to the County of *Tyrone*, and to the County and City of *Dublin*, where it was supposed he had property or might be found to be arrested; on those several writs returns were made by the Sheriffs, that he was not to be found, and had no property that could be seized. After giving credit for the two sums of £4000 each paid by the sureties, there still appeared a balance due to the government on account of monies that ought to have been paid by the treasurer of £3253 5*s.* 9*d.*

The Treasurer retained his office until the Spring Assizes in 1836, when he resigned the treasurership, having previously removed his family from the County of *Tyrone*. His insolvency was not doubted or denied; and the 182nd section of the 6 & 7 W. IV. c. 116, actually recited his insolvency, and enacted that by reason thereof the Lords of the treasury were authorized to lend to the County the £8000 recovered from his sureties.

Previous to the Spring Assizes in 1837, the government sent down the following certificate, which was laid before the grand jury, and upon which they were required to present the sum therein appearing due:

"County of *Tyrone*.—Due to the Crown, upon pre-
"sentments passed up to Spring Assizes, 1835, inclusive.
"Account of sums advanced out of consolidated fund,
"under the provisions of the Acts specified below:

"Constabulary, 3 G. IV. c. 103, ...	£5489	9	9½
"Lunatic Asylum, (building,) 57 G. III.			
"c. 106, and 1 & 2 G. IV. c. 33, ...	682	4	10
"Do. (Support,) do. do. ...	1801	9	9½
Forward ...	£7973	4	5

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Carried forward ...	£7973	4	5
" Boards of Health, 58 G. III. c. 47,	619	14	11½
" Valuation of lands, 7 G. IV. c. 62,	208	1	7
" Gaols and Bridewells, 50 G. III. c.			
" 103; 7 G. IV. c. 74, ...	2452	4	10
Total,	£11253	5	9½
" Deduct paid into the Exchequer by			
" Edward Tierney, Esq. Crown Soli-			
" licitor, as recovered from the late			
" Treasurer's sureties, on 7th Novem-			
" ber, 1836, ...	8000	0	0
Remains due to the crown,	£3253	5	9½

" I hereby certify that the above advances were made " pursuant to the Lord Lieutenant's directions, as herein " particularized, on which there remains to be presented " the sum of £3253 5*s.* 9½*d.*, which has been included in " presentments passed by the Grand Jury, and not paid; " and as this amount still remains due to the Crown, the " Grand Jury are hereby required to present accordingly.

" Dublin Castle, March 1, 1837.

" T. DRUMMOND."

The Grand Jury were also furnished with a full account of all the presentments, on foot of which the balance remained due; but after full discussion they informed *Moore*, J., that they declined making the presentment, alleging amongst other things the following reasons: First, That the sum of £3253 5*s.* 4½*d.*, claimed by government as a debt due by the late Treasurer of the county, to His Majesty's Treasury, was a sum composed of an aggregate of balances, said to have accrued prior to the year 1835, and that it was manifest there had been great remissness on

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the part of the Crown in the enforcement of their claims at the proper periods, and also in giving receipts to Mr. *Galbraith*, for later periods, when demands upon him of an anterior date were unsatisfied. Secondly, that the Crown had received and appropriated to its own exclusive use the sum of £8000, being the full amount for which the late Treasurer passed his securities. Thirdly, that in the account furnished to them by the Crown Solicitor, and which by the certificate they were required to present, they discovered an error to the amount of £682 4*s.* 10*d.*, which was one of the items; and that they had no doubt that other errors would be discovered on further examination, and comparison of vouchers. The Grand Jury further requested permission to be heard by counsel, on the construction of the Statute 6 and 7 Wm. IV. c. 116, with respect to the authority of the Judge to order the presentment, upon the refusal of the Grand Jury.

Counsel accordingly, on behalf of the Grand Jury, contended, that under the 179th section of the Statute, the Judge had no power to order the sum claimed to be levied, inasmuch as the several sums which constituted the aggregate of the sum claimed had been all theretofore regularly presented by the Grand Jury, raised off the county, and paid to the Treasurer; and that that section did not authorize him (the Judge,) to present or re-present where a presentment had been before already made; and that the Judge's authority extended no further than to enable him to make the order where no presentment had been before made. That he had not any thing to do with the payment, but merely with the presenting of the money; and that it appeared from the accounts furnished by the Crown, that in every instance the several instalments had been actually

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theretofore ordered by the Judge to be levied whenever the grand jury had declined to present.

It was further urged, that the 179th section was not in any case imperative upon the Judge, but left him a discretion; and that as the Crown had suffered the Treasurer to incur so great an arrear without complaining to the grand jury or giving them notice of his default of payment, the Judge should not, in exercising a sound discretion, make the order required; the more especially as under the Statute of 7 G. IV. c. 49, s. 8, the Crown had the power of proceeding against the Treasurer for a penalty of £50, and interest, at the rate of six per cent, in case he neglected to pay over the money due to government, for the space of twenty-one days after the commencement of each assizes.

With respect to the duty of the Grand Jury, it was insisted that they were not bound by the 145th section of the Act to present for any sum remaining unpaid by the insolvency of the Treasurer, but that they had likewise a discretionary power either to do so or refuse; for that in all cases where it was made imperative on the Grand Jury to present, the words, "and they are hereby required," were contained in the enactment, as in sections 90, 93, 94, 182, 183, of the same Statute; and that even supposing it were imperative on them to present for deficiencies, they should present for the entire and not merely for a portion of the sum deficient; and that there was an error in the account furnished, to the amount of £682 4*s.* 10*d.*, for which credit had been omitted in the certificate.

On behalf of the Crown it was contended, that it was

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the duty of the Grand Jury to examine the Treasurer's account at each assizes, and to require him to produce his receipts and vouchers for his payments; and if this had been done, and the Grand Jury had done their duty, no default could have arisen; whereas it did not appear that the Grand Jury ever regularly examined or checked any account of their Treasurer. It was also urged that the 179th section of the Statute was imperative upon the Grand Jury to present the deficiency as certified; and in default of their doing so, upon the Judge to order the amount to be levied.

The learned Judge reserved the questions upon the construction of the Statute, and particularly of the 179th section, with reference to the preceding state of facts, for the consideration of the Judges.

THE JUDGES (*Bushe*, C. J., being absent, *Richards*, B., *dissentiente*,) were of opinion that the Grand Jury were not bound at the instance of the Crown to make presentments for the deficiencies of the insolvent Treasurer in any of the instances mentioned in this case; and that the Judge, upon their refusal to make the required presentment, was not, under the 179th section of the Statute, bound to order the sums to be levied, as if presented. An opinion was also generally expressed (though no decision upon the point was pronounced,) that the Crown was not within the 145th section.

IN the Matter of a Presentment to repay the TREASURER of the QUEEN'S COUNTY sums due by a defaulting COLLECTOR. *Feb.* 1838.

A SCIRE FACIAS had issued on a recognizance entered into by *W. Kemmis, Esq.*, on the 2nd of Dec. 1823, as Treasurer of the *Queen's* County, in the sum of £3000, conditioned for the faithful discharge of the duties of the office of Treasurer. The defendant (*Kemmis*) pleaded general performance, and the plaintiff by his replication assigned four breaches, which in substance were, that the defendant, as such Treasurer, issued his warrant to one *Philip Hurley*, to levy a sum of £712 8*s.* 5½*d.* presented by the Grand Jury of said county, to be raised off the barony of *Ballyadams*, although the said *Hurley* was not duly authorized as High Constable or Collector for said barony to levy or collect said sum, or to act as such High Constable or Collector in that behalf, and had not to the knowledge of the defendant, given the security in that behalf required by the Statute; and that although it was the duty of the Treasurer not to issue his warrant to any person not duly authorized, and who had not given such security, yet he issued his warrant to the said *Philip Hurley*, well knowing that at the time of the issuing thereof, or at any time afterwards, the said *Philip Hurley* was not duly authorized to act as High Constable or Collector for said barony, and had not entered into the proper security. There was then an averment that *Hurley* levied said sum, and absconded with it, whereby it was wholly lost. The defendant filed a rejoinder to each breach, stating in substance that the Grand Jury had not appointed any collector; that *Hurley* was High Constable of the barony; that defendant issued his warrant to

A collector of grand jury cess having proved a defaulter, the grand jury sued the treasurer in the Court of Exchequer, where the Court gave judgment for the defendant, holding that it was the duty of the grand jury, and not of the treasurer, to take care that the collector should give sufficient security. The grand jury afterwards made a presentment for the deficient sum, to be levied off the county, and paid to the treasurer, he having debited himself conditionally with that amount. *Held*, that the presentment was legal.

1838.

QUEEN'S CO. PRESENTMENT, DEFAULTING COLLECTOR.

him as such, by which he was authorized to levy said sum, and did levy same as he ought and lawfully might do.

The plaintiff demurred to each rejoinder, assigning for causes: First, that the rejoinder did not shew that *Hurley* had entered into the security required by the Statute to authorize him to collect. Secondly, that the rejoinder averred that *Hurley* was authorized by the Treasurer's warrant to collect, whereas in point of law he was not authorized to collect, unless he entered into such security. Thirdly, that the defendant was not warranted in the due discharge of his duty as Treasurer, to issue his warrant to *Hurley*, until or unless he had entered into such security. Fourthly, that the rejoinder did not traverse or deny that at the time defendant issued his warrant to *Hurley*, or at any time afterwards, he, the defendant, knew or had notice that *Hurley* was not authorized to collect or had not entered into such security. Fifthly, that it was not shewn by said rejoinder that before defendant issued his warrant, he caused *Hurley* to execute a bond and warrant to him as Treasurer, pursuant to the Statute, or enquired or ascertained whether he had executed such bond. Sixthly, that the rejoinder did not tender any certain or material issue in fact.

This demurrer (the question raised by which chiefly turned upon the 36 G. III. c. 55, ss. 48, 49, 50, 52, and the 49 G. III. c. 84, ss. 24 & 15,) came on to be argued before the Barons of the Exchequer, in Easter Term, 1837, when the Court, after hearing counsel on behalf of the Grand Jury and the Treasurer, gave judgment for the defendant, stating that in their opinion it was the duty of the Grand Jury to take care that sufficient secu-

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QUEEN'S CO. PRESENTMENT, DEFAULTING COLLECTOR.

rity was entered into by the collector before them, and that not having done so, it was by their default and not that of the Treasurer, that the loss had been sustained.

The proceedings on the *scire facias* had been taken in consequence of an order made at the Summer Assizes in 1834, by *Johnson*, J., with the view of having the disputed question between the Grand Jury and the Treasurer, as to the liability of the Treasurer or the county for the loss sustained by *Hurley's* default, decided by such legal proceeding against the Treasurer as the Grand Jury should be advised to take. And at the Summer Assizes in 1837, the Grand Jury being apprized of the decision of the Court of Exchequer, made a presentment for the sum of £661 12*s.* 6*d.* to be levied off the county, to reimburse the Treasurer, who had debited himself conditionally with that sum, and submitted it to *Moore*, J., (the Judge of Assize,) to fiat, if, in his judgment, the county was then to be charged with it. The learned Judge observing some difference of opinion on the subject, respited the presentment for the consideration of the Judges; the question reserved being, whether the judgment on the demurrer was conclusive as to the non-liability of the Treasurer, and whether the Grand Jury had then the power under the 145th section of the 6 and 7 Wm. IV. c. 116, to present the said sum of £661 12*s.* 6*d.* to be raised off the county, to reimburse the Treasurer the sum for which he had debited himself for the default of *Philip Hurley*.

TEN JUDGES (*Joy*, C. B., and *Pennefather*, B., being absent,) unanimously ruled that the presentment should be fiated, provided the Crown should disclaim ulterior proceedings in the Exchequer.

April 30, 1838.

In the Matter of Decisions upon RESERVED CASES.

Held, that the opinion of the majority of the Judges upon cases reserved from circuit is binding upon the individual Judges, whatever their own opinion may be.

In consequence of a doubt which had been raised as to the extent to which an individual Judge, upon circuit, ought to consider himself bound by the opinion and decision of the majority of the Twelve Judges upon questions reserved from circuit for their consideration in the Queen's Bench Chamber; it was resolved at a meeting of the Judges, on the 11th of February, 1838, that the English practice upon this subject should be ascertained, and for this purpose *Bushe*, C. J., wrote to Lord *Denman*, C. J., making the necessary inquiries. The answer of Lord *Denman* was as follows:

"*London*, Feb. 13, 1838.

"My Lord,

"I am honoured with your lordship's letter, inquiring "whether the Judges of *England*, on their circuits, hold "themselves bound by the opinion of the whole body of "the Judges, on Crown cases reserved; and I have no dif- "ficulty in stating, that each of us does hold himself so "bound, whether or not his own opinion may have agreed "with that of the majority, and whether or not the case "may have been argued by counsel.

"I have the honor to be,

"Your lordship's faithful servant,

"DENMAN.

"*Rt. Hon. the Lord Chief Justice of Ireland.*"

Copies of this correspondence having been furnished to the other Judges, a second meeting took place upon the

30th of April, 1838, when the question was proposed, "whether each of the Twelve Judges of *Ireland* ought to "hold himself bound by the opinion of the majority of the "Judges, upon cases reserved from circuit, whether his "own opinion agreed with the majority or not?"

1838.
Decisions on Reserved Cases.

All the Judges were present, and gave their opinions *seriatim*. Ten of them, (Bushe, C. J., Doherty, C. J. C. Pleas, Joy, C. B., Moore, J., Johnson, J., Burton, J., Pennefather, B., Torrens, J., Foster, B., and Crampton, J.,) resolved the question in the affirmative. Perrin, J., and Richards, B., held, that it should be answered in the negative(*a*).

(*a*) For the circumstances which led to this discussion, and the letter of *Bushe*, C. J., see "*Alcock's* observations on the nature and origin of the meetings of the Twelve Judges," pp. 1—4.

IN the Matter of an Application for PRESENTMENTS for an Arrear of £358 10*s.* 5*d.* due by the QUEEN'S COUNTY to the Government for Advances to BOARDS OF HEALTH in the Years 1819 & 1820.

June 13, 1838.

An application having been made by direction of the Lord Lieutenant to a grand jury to present the amount of arrears due to government 19 years before, for advances made by government for a Board of health; and the grand jury having refused, on account of the length of time which had elapsed: *Held*, that the Judge of Assize was authorized to make an order for the amount, under s. 179 of the 6 & 7 W. 4, c. 116.

At the Spring Assizes for the Queen's County, in 1838, an application was made to the Grand Jury, by direction of the Lord Lieutenant, to present for the sum of £353 10*s.* 5*d.* being, as was stated, an arrear of advances made by the government in the years 1819 & 1820, for a Board of Health for the barony of *Portnahinch* in that county, for fever

1838.

Queen's Co. Presentment, Government Advances.

hospital purposes(*a*). That sum was admitted by the Grand Jury to be due, but the application having been refused on the ground that it would be a hardship on the present landholders, &c. to be called upon after a lapse of nearly twenty years, to contribute to the payment of a sum which might long since have been paid, but for the negligence of the government in not making application for the presentment at a proper time ; *Tickell* applied to the Court under the 6 & 7 W. IV. c. 116, s. 179, to make an order in lieu of a presentment, on the following grounds :—1st, The refusal of the Grand Jury to present : 2ndly, On proof of the appointment by the Lord Lieutenant, upon the 22nd July, 1818, of the Board of Health for the barony of *Portnahinch ;* 3rdly, On proof of the advances made to the treasurer of the Board of Health, by production of his books, and a certified copy of a power of attorney from him to one *Ridgeway*, dated the 25th Nov. 1818, to receive advances from the treasury for the Board of Health, and a certified copy of the Lord Lieutenant's warrant to the treasury, dated 19th May, 1819, directing the issue of a sum of £60, on account of the Board of Health, with *Ridgeway's* receipt for that sum : and 4thly, The Under Secretary's certificate of the sums advanced for the Board of Health, certifying that those advances had never been repaid, and that the foregoing sum still remained due to the Crown, and requiring the Grand Jury to present for it, under the 6 & 7 W. IV. c. 116, s. 179.

After hearing *Tickell* and several of the Grand Jury upon the question, *Johnson*, J., directed an order to be put upon

(*a*) Under the 58 G. 3, c. 47.

1838.
Queen's Co. Presentment, Government Advances.

the crown-book, requiring the sum in question to be raised off the county at large, but at the same time respiting the levy, until the learned Judge should have an opportunity of conferring with the Twelve Judges on the subject. The order was as follows:—"Queen's County, "Lent Assizes, 1838. It is ordered by the Court, on "motion of Mr. *Tickell* of counsel for the Crown, that "the sum of £353 10*s.* 5*d.* be raised off the county at "large, and paid to the Treasurer, and by him paid over "to the government, to reimburse them for advances made "on account of the Board of Health for fever hospital "purposes, for the barony of *Portnahinch*, in the years "1819 & 1820.—Respited by the Court, for the opinion "of the Twelve Judges."

The appointment, by the Lord Lieutenant, of the Board of Health was in the following terms:—

"By the Lord Lieutenant General and General Governor of Ireland.

"*Talbot.*

"Whereas, by an Act passed in the 58th year of "his Majesty's reign(*a*), entitled 'An Act to esta-"'blish fever hospitals, and to make other regulations "'for the relief of suffering poor, and for preventing the "'increase of infectious fevers in Ireland,' it is enacted, "that whenever in any city, town, or district, any fever "or contagious distemper shall appear, or be known to "exist amongst the poor inhabitants, it shall and may be "lawful for any one or more magistrates, upon the re-"quisition of five respectable householders, to convene a

(*a*) *c.* 47.

1838.

QUEEN'S CO. PRESENTMENT, GOVERNMENT ADVANCES.

" meeting of the magistrates and householders of such " city, town or district, and of the medical practitioners " within the same, in order to examine into the circum- " stances attending such fever or contagious distemper, and " the number of persons or families being sufferers there- " by; and if it shall be the opinion of such meeting, and of " one or more magistrates attending, that such fever or " contagious distemper is of a nature to require particular " attention and circumspection, to prevent the increase of " the contagion thereof, it shall be lawful for two or more " magistrates authorized by such meeting to join in an appli- " cation to the Lord Lieutenant, or other Governor or Go- " vernors of *Ireland*, for the time being, to appoint a Board of " Health within and for such city, town, or district, and that " it shall be lawful for such Lord Lieutenant, or other Chief " Governor or Governors of *Ireland*, to appoint such board " accordingly, to consist of not more than thirteen commis- " sioners, to be selected from among the Governors or mem- " bers of the Corporation of any Infirmary or Fever Hospi- " tal, or other hospital, and from the parishioners and medical " practitioners, to act within such city, town, or district, in " such manner and under such regulations as such Lord " Lieutenant or other Chief Governor or Governors of " *Ireland*, or his or their Chief Secretary shall from time " to time order, direct, and appoint. And whereas a meet- " ing of the magistrates and householders of the barony of " *Portnahinch*, in the *Queen's* County, and of the medical " practitioners within the same, has been convened to en- " quire into the circumstances attending a fever or conta- " gious distemper which has appeared among the poor " inhabitants thereof; and it is the opinion of the said " meeting, that the said fever or contagious distemper " is of a nature to require particular attention and circum-

1838.
Queen's Co. Presentment, Government Advances.

" spection, to prevent the increase of the contagion there-
" of, they have authorized *Matthew Anketell*, Esq., and
" ——— ———, magistrates of the said county, to
" make application to us, to appoint a Board of Health
" within and for the said barony of *Portnahinch*, in the
" *Queen's* County: We do therefore, in pursuance of the
" power vested in us, as aforesaid, hereby appoint the
" following persons to be a Board of Health for the said
" barony of *Portnahinch*, in the said *Queen's* County,
" accordingly, viz. &c. " July 22nd, 1818."

Eleven Judges decided unanimously in favour of the order(*a*).

(*a*) See s. 180 of the 6 & 7 W. 4, c. 116, creating a limit of five years for payment of *future* advances.

IN the Matter of a Presentment against the Seneschal of a MANOR COURT, County ANTRIM.

Nov. 1838.

At the Summer Assizes for the County of *Antrim*, in 1838, the Grand Jury presented, under the 7 G. IV. c. 74, s. 99, that *Arthur Gamble*, Seneschal of the Manor of—— should pay to the proper officer for the County of *Antrim* £8, being the amount due for supporting certain prisoners in the County Gaol, who had been taken in execution within the local jurisdiction and transferred to the County Gaol under the 96th section. The Marquis of *Donegal* was the lord of the manor, *Arthur Gamble* was the seneschal, and there were three bailiffs, permanent officers.—The bailiffs received fees on executions.—The seneschal was not at

Held, that a seneschal of a manor court, within the jurisdiction of which there was no local prison, was not liable under the 7 G. 4, c. 74, s. 99, to pay for the support of prisoners in the county gaol under execution from the manor court; the seneschal not being able to refuse executions, nor

paid by fees upon them, nor allowed to direct the process to any one except the permanent bailiffs, who *were* so paid.

1838.

Co. Antrim Presentment, Seneschal.

liberty to refuse execution against the body, and had no jurisdiction to direct the process to any one except to these officers. The seneschal opposed the fiating of this presentment, complaining of the extreme hardship of being called on to pay out of his own pocket for these expenses. He had no fee upon executions. There never was any local prison within this jurisdiction, so that no reference could be made to any practice antecedent to the 7 G. IV. with respect to the mode of maintaining prisoners, for the purpose of affording any illustration upon the question.

Under these circumstances, *Foster*, B., (the Judge of Assize) reserved for the opinion of the Judges the following questions:---1st: Whether the presentment ought to be fiated?---2dly: In case it ought not, in what manner, if any, was the county to be paid?

The Judges unanimously decided against the presentment upon the first question; but did not consider themselves called upon to give any opinion upon the abstract question proposed by the second.

The QUEEN *v.* FRANCIS DONAGHER. *Dec.* 4, 1838.

On the trial of an indictment for passing an accountable receipt, it appeared that notice was served on the 26th of October, on the prisoner, to produce the document; the commission opened the following day, but the trial did not take place until Nov. 2; and the receipt not being produced, a witness proved that the prisoner, with whose family he had been acquainted, had handed him the document, and requested him to institute proceedings upon it; this the witness refused to do, but kept the document, and delivered it to a third person to be shown to the party whose name was forged; after which the witness returned it to the prisoner.

At the sitting of the Commission for the City of *Dublin*, in October, 1838, the prisoner was tried before *Moore*, J., on an indictment for forging an accountable receipt in these words: "I acknowledge to have received "from *Francis Donagher*, the sum of one hundred and "thirty pounds, for which I promise to be accountable. "*Richard Griffith*." The instrument not having been produced, after evidence had been given that the prisoner had demanded the amount from Mr. *Griffith*, both verbally and by a letter, which was proved by Mr. *Griffith* to have been in the prisoner's handwriting, a notice was proved to have been served on the 26th of October upon the prisoner, who was then in Newgate, and a *subpœnâ duces tecum* on Mr. *Croker*, his attorney, to produce it on the trial. It was objected, that this notice was not given in sufficient time before the opening of the Commission (which took place on the 27th), to lay a foundation for letting in secondary evidence, but as the trial did not take place until the 2nd of November, the Court held there was reasonable time given by the notice to produce the document, and over-ruled the objection.

Mr. *Henry Major*, an attorney, was then examined: he said, that about the 12th of June, 1838, the prisoner, with whose family he had some acquaintance, handed him the document, and requested of him to institute proceedings

The prisoner being convicted, *Held*, that the conviction was wrong, on the ground that the communication between the witness and the defendant was privileged.

Semble, that the notice was sufficient.

1838.
REGINA v. DONAGHER.

against Mr. *Griffith* upon foot of it. Witness refused to be concerned for the prisoner; the prisoner left the document with witness, who afterwards delivered it to Mr. *Lawler* to be shown to Mr. *Griffith*, in order to inquire as to the genuineness of the document. A day or two after this the prisoner again applied to witness, and pressed him to be his attorney; but witness declined, in consequence of something which had occurred; he did not in any manner act or undertake to be his attorney, but having got the document from the prisoner, he returned it to him. On cross-examination, the witness said he had no doubt the prisoner had come to him with a view to engage him as his attorney, but he gave him no instructions, neither had he any comunication with him about sending the document to be shown to Mr. *Griffith*, that being witness's own act.

Thomas Henry Lawler was then examined, who said, that he showed the document which he had received from Mr. *Major* to Mr. *Griffith*.

To the admissibility of this evidence, two objections were taken; 1st, That Mr. *Major* should not be permitted to give evidence respecting a document which had come into his hands in the manner above stated; 2ndly, That the communication from Mr. *Lawler* to Mr. *Griffith*, when he produced to him the document in question, took place without the authority of the prisoner, and was a violation of professional confidence. The Court over-ruled these objections, and the case having gone to the jury upon the foregoing and other evidence, they found the prisoner guilty.

The learned Judge respited the sentence, for the purpose of obtaining the opinion of the Twelve Judges on the fol-

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lowing questions: first, whether there was sufficient notice given to produce the instrument, so as to let in secondary evidence of its contents; and secondly, whether under all the circumstances before stated, what took place between the prisoner and Mr. *Major* was to be considered as a privileged communication as between client and attorney, and the communication between Mr. *Lawler* and Mr. *Griffith* a breach of professional confidence.

TEN JUDGES having met, (*Doherty*, C. J. C. Pleas, and *Richards*, B., being absent,) SEVEN of them, (WOULFE, C. B., JOHNSON, J., BURTON, J., PENNEFATHER, B., TORRENS, J., FOSTER, B., and PERRIN, J.,) were of opinion that the conviction was wrong, on the ground that what had taken place between the prisoner and Mr. *Major* was a privileged communication. The remaining three (BUSHE, C. J., MOORE, J., and CRAMPTON, J.,) were of a contrary opinion.

THE QUEEN *v.* EDWARD FLANNERY.

Jan. 16, 1839.

THE prisoner was tried and found guilty at the *Clonmel* Summer Assizes, in 1837, before *Crampton*, J., upon the following indictment:—"The jurors of our lady the queen "upon their oath do say and present, that *Edward Flannery*, "late of *Boher*, in the Co. of *Tipperary*, yeoman, on the "19th of May, 1 Vict., with force and arms, &c., at, &c., in "the said county, did then and there wilfully, maliciously, "unlawfully, and by threats and menaces, threaten violence then lately before discharged from his service," is bad.

An indictment charging that the prisoner did "by threats and menaces threaten violence to the person of one J. G., in the event of his not taking back into his employment a certain man whom he had

Such an indictment, supposing it were good, is not supported by evidence that J. G. was agent to another person, and hired servants to be employed about the work of that person, which J. G. superintended; and that the discharge of one of these servants was the occasion of the threats stated in the indictment.

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REX v. FLANNERY.

" to the person of one *James Goulding*, a subject of our " said lady the Queen, in the event of him the said *James* " *Goulding* not taking back into his employment a certain man " whom he the said *James Goulding* had then lately before " discharged from his service, in contempt of our said lady " the Queen and her laws, against the peace of our said " lady the Queen, her crown and dignity, and against the " form of the statute in that case made and provided."(*a*)

Part of the evidence was, that *James Goulding*, the prosecutor, was an agent to Mr. *Bourne*, a coach owner, and resided at *Kilmastulla*, where Mr. *Bourne* had stables and horses; that Mr. *Goulding* had the care of these stables and horses, and hired and discharged the servants who were employed about them, and that he had lately discharged a stable-man named *Houragan*, who had been employed in the stables at *Kilmastulla*. The charge was in other respects abundantly sustained by the evidence; but it was objected by *Rolleston*, the prisoner's counsel, 1st, That the indictment was insufficient in law: and 2dly, that the proof varied from the charge, inasmuch as the employment from which *Houragan* had been discharged, was shewn to be that of *Bourne*, and not of *Goulding*, as stated by the indictment.

TEN JUDGES (*Burton*, J., and *Perrin*, J., being absent) unanimously held that the indictment was bad. The majority also were of opinion that the evidence was insufficient.

(*a*) *Semble*, the Whiteboy Act, 15 & 16 G. 3, c. 21, s. 3.

THE QUEEN *v.* WILLIAM BARRAN and JOHN MURPHY.

April 22, 1839

An indictment for stealing *sheep* is supported by evidence of stealing *ewes*.

At the Spring Assizes for the Northern Riding of the County of *Tipperary*, in 1839, at *Nenagh*, *William Barran* and *John Murphy* were tried and found guilty before *Bushe*, C. J., upon the following indictment;---"County of *Tip-* "*perary*, North Riding, to wit.---The jurors for our lady "the Queen upon their oath do say and present, that "*Laurence Murphy*, late of, &c., in the County of *Tip-* "*perary*, *William Barran*, late of, &c., and *John Murphy*, "late of, &c., in the same Co. of *Tipperary*, yeomen, on "the 5th day of February, 2 Vict., with force and arms, "&c., at, &c., six sheep each of the price of one pound "sterling, of the goods and property of one *John Costello*, "then and there being found, did then and there feloniously "steal, take, and drive away, against the peace of our "said lady the Queen, her crown and dignity, and contrary "to the form of the statute in that case made and "provided."

The same persons were at the same time found guilty upon another indictment for a similar offence on a different day, which did not vary from the above, except that it only charged the stealing of two sheep. Upon the trial it appeared in evidence that all the sheep in both indictments were ewes: upon which the counsel for the prisoners insisted that the evidence did not support the indictment, and that the prisoners ought to be acquitted; and relied upon *Rex v. Cook*, 1 Leach, 105; 2nd East, P. Cr., 616; and other cases collected in Archb. Plead. & Ev. 192, 5th

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REGINA v. BARRAN AND MURPHY.

edition(*a*). On the other hand the counsel for the crown contended that sheep being a *generic* term, included ewes, and also that the 9 G. IV. c. 55, s. 25, applying to Ireland, contained a proviso not to be found in the English Act, 7 and 8 G. IV. c. 29, s. 25; by reason of which, and of the different enumeration in the latter, the English cases did not govern those in question.

The learned Chief Justice left the cases to the jury, who found the prisoners guilty on both indictments; and his lordship stated his intention to submit the objection to the indictments to the 12 Judges, and in case they should consider the indictments not to have been supported by the evidence, to recommend the convicts for a free pardon.

NINE JUDGES (*Woulfe*, C. B., *Pennefather*, B., and *Foster*, B., being absent) unanimously ruled that the conviction was good, on the authority of *M'Cully's* case, 2 *Lewin's* C. C. 272.

(*a*) Page 195, in 8th Ed.

IN the Matter of a Presentment for a MEDICAL WITNESS, at a Coroner's Inquest, Co. CLARE.

April 22, 1839.

A Coroner of the County of *Clare* granted an order to a medical witness who attended at an inquest, for the sum of £3, under the 99th section of the 6 & 7 Wm. IV. c. 116, s. 99. The presenting Sessions reduced the sum to £2. The Grand Jury passed the presentment for £2. The medical gentleman insisted before *Richards*, B. (the Judge of Assize), that the presenting Sessions or grand jury had no right to reduce the order of the Coroner from £3 to £2, and that the Grand Jury had no power to adopt the reduction made by the presenting Sessions, and pressed the learned Baron to direct the Grand Jury to pass a presentment for £3, the sum ordered by the Coroner.

The magistrates and cess-payers at presentment sessions have power to reduce the sum ordered by a coroner to be paid to a medical witness, under the 6 & 7 W. 4, c. 116, s. 99; and the grand jury have no power to increase it afterwards, so as to make it conformable to the coroner's order. The Judge at the assizes must fiat the presentment as it came from sessions.

The 17th section of the Act appeared to his lordship to give the presenting Sessions a jurisdiction to reduce or modify the class of presentments therein referred to; but that section, it was contended, refers to presentments for county works, and to those presentments only that had been the subject of the prior sections of the Act.

The learned Baron respited the presentment until the opinion of the Judges should be obtained upon the question; and in reserving the case his lordship referred to the 38th section, by which it is enacted, That from the passing of that Act it shall not be lawful for any Grand Jury to make a presentment for any public work whatsoever, or for raising any money for which an application shall not have been made and approved of at Sessions either wholly or in part as therein before provided, &c.; and also to the 97th and

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Co. Clare Present-ment, Coroners.

98th sections of the same Act, and the 7 Wm. IV. c. 2, s. 6, as possibly bearing on the subject.

The questions reserved were as follows:—Have the magistrates and cess-payers at Sessions a right to reduce the amount of the Coroner's order? 2ndly, Has the Grand Jury a power to increase the sum, so as to make it conformable to the Coroner's order? 3rdly, If the presenting Sessions reduce the amount of the Coroner's order, and the grand jury pass the presentment as sent up to them from Sessions (as in the present case), what is the Judge to do? Is he to pass the presentment, or to reject it *in toto?*

A case similar in principle to the foregoing was brought before the learned Baron by *Jackson*, Serj. in the County of *Cork*, which his lordship also reserved.

Nine Judges (*Woulfe*, C. B., *Pennefather*, B., and *Foster*, B., being absent) unanimously held, 1st, that the Sessions may reduce the sum paid by the Coroner; 2ndly, that the Grand Jury cannot increase it; and 3rdly, that the Judge must pass it, as it came from Sessions.

THE KING *v.* MATTHEW MEANY.

April 22, 1839.

Where a prisoner was convicted upon an indictment under the 51 G. 3, c. 63, s. 6, for an escape from prison, the former conviction (which was proved by a certificate from the crown office,) having been under the 1 Vic. c. 87, ss. 6 & 10, and the sentence six months' imprisonment: *Held*, that the conviction was bad, as the escape did not come within the 51 G. 3, c. 63.

At the Spring Assizes for the City of *Kilkenny*, in 1839, *Matthew Meany* was tried before *Crampton*, J., on the following indictment, which was founded upon the 51 G. III. c. 63, s. 6 :—"County of the City of *Kilkenny*, to wit. "The jurors of our lady the Queen upon their oath do say "and present, that heretofore, to wit at a general quarter "Sessions of the peace holden at *Kilkenny* on the 26th "day of April, in the 1 Vict., before *Richard Sullivan*, "Esq. then and there being Mayor of the City of *Kilkenny*, "and *William Henry Bracken*, Esq. then and there being "Recorder of the said City of *Kilkenny*, and others their "associates, justices of our said lady the Queen, assigned "to keep the peace of our said lady the Queen in and for "the said County of the City of *Kilkenny*, and also to hear "and determine divers felonies, robberies, trespasses, and "other misdemeanors committed or done in the said Co. "of the City of *Kilkenny*, *Matthew Meany* was in due "form of law indicted, tried, and found guilty, for that "he on the 29th day of March, in the first year of the "reign of our said lady the Queen, at, &c., did assault "*Martin Proctor*, with intent the money of the said "*Martin Proctor* from the person and against the will "of the said *Martin Proctor* feloniously and violently "to steal, take, and carry away, against the peace of our "said lady the Queen, and contrary to the form of the "statute in that case made and provided; and also that he "the said *Matthew Meany* did at the time and parish "aforesaid assault the said *Martin Proctor;* whereupon it "was therefore considered by the said court there that the

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" said *Matthew Meany* should be imprisoned for the term of " six months and be kept to hard labour, and kept in soli- " tary confinement for the last fortnight; as by a certificate " of the record of the indictment and conviction doth more " fully and at large appear. And the jurors aforesaid upon " their oath aforesaid do further say and present that the said " *Matthew Meany* being so as aforesaid tried and convicted " of the said offence and assault, was then and thereupon " and in execution of his said judgment for the said offence " and assault duly committed to the custody and keeping " of *Peter Duncan*, who was then and there the gaoler of " her said Majesty's gaol of the County of the City of " *Kilkenny*. And the jurors aforesaid upon their oath " aforesaid do further say and present, that the said *Mat-* " *thew Meany* afterwards, and whilst he was so in custody " of the said *Peter Duncan*, the gaoler and keeper of the " said gaol as aforesaid, under and by virtue of the said " judgment and sentence aforesaid, to wit, on the 31st day " of July in the 2nd year of the reign aforesaid, with force " and arms, at *Kilkenny* aforesaid, in the County of the " City of *Kilkenny* aforesaid, against the will and without " the licence of the said *Peter Duncan*, the gaoler and " keeper of the said gaol as aforesaid, unlawfully, wickedly, " violently, and feloniously did break the gaol of the said " County of the City of *Kilkenny*, by breaking the door " and window of the said gaol; by means whereof he the " said *Matthew Meany* did then and there escape and go " at large out of the said gaol and from the custody of the " said *Peter Duncan*, the keeper and gaoler of the said gaol " of *Kilkenny* in the County of the City of *Kilkenny* afore- " said, to the great hindrance and obstruction of justice, " in contempt of our said lady the Queen and her laws, to " the evil example, &c."

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The evidence was as follows:—*Peter Duncan*, the gaoler of the City, swore that the prisoner, who was in his custody under a conviction at the quarter Sessions, broke gaol and escaped by breaking the door and window of the said gaol, by means whereof he the said *Matthew Meany* did then and there escape and go at large out of the said gaol and from the custody of the said *Peter Duncan*, the keeper and gaoler of the said gaol, &c. The following certificate of the clerk of the peace was then produced and proved. " I certify that at a general quarter Sessions held " in and for said City the 26th of April, 1838, before " *Richard Sullivan*, Esq. (Mayor), *William H. Bracken*, " Esq. Recorder, &c., *Matthew Meany* was indicted for " that he on the 29th of March, 1st Vict., at, &c., felon- " iously did assault *Martin Proctor*, with intent the monies " of the said *Martin* from the person and against the " will of said *Martin* feloniously and violently to steal, take, " and carry away, against the peace and statute; and was " also indicted for a common assault on said *Martin*.---27th " April. Tried and found guilty, and sentenced to be im- " prisoned for six months, and kept to hard labour, and to " be kept in solitary confinement for the last fortnight.

" Patrick Walters,

" Clerk of the peace."

The indictment upon which this conviction took place was then proved, and it was as follows :---" County of the " City of *Kilkenny* to wit.---The jurors for our said lady the " Queen upon their oath do say and present that *Matthew* " *Meany*, now a prisoner in the gaol of said City, on the " 29th day of March, in the 1st Vict., with force and arms, " &c., at, &c., in and upon one *Martin Proctor*, in the " peace of God and of our said lady the Queen then

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and there being, feloniously did make an assault, with "intent the monies of the said *Martin Proctor* from the "person and against the will of him the said *Martin* "*Proctor* then and there feloniously and violently to "steal, take, and carry away, against the form of the "statute in such case made and provided, and against the "peace of our said lady the Queen, her crown and dignity. "And the jurors aforesaid upon their oath aforesaid do fur- "ther present, that the said *Matthew Meany* on the said "29th day of March, in the year aforesaid, with force and "arms at, &c., in and upon the said *Martin Proctor*, in the "peace of our said lady the Queen then and there being, "did make an assault, and him the said *Martin Proctor* did "then and there beat, wound, and ill-treat, and other wrongs "to the said *Martin*, then and there did, to the great damage "of the said *Martin*, and against the peace of our said lady "the Queen, her crown and dignity."

The conviction upon this indictment was under the 1 Vict. c. 87, ss. 6, 10, by which the offence of assaulting with intent to rob is made punishable by imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement.

The prisoner was found guilty, but the learned Judge doubting that the certificate of the prisoner's conviction was under the circumstances admissible evidence,—and also doubting that the indictment, which was founded upon the statute of the 51 Geo. III. c. 63, s. 6, was sustained by the evidence—refrained from passing any sentence, reserving the points for the consideration of the Twelve Judges. His Lordship, in reserving the case, submitted the following observations to the consideration of the Judges.—The con-

viction of the prisoner at the Mayor's Court in *Kilkenny* in April 1838, was under the 1 Vict. c. 87, ss. 6 and 10, by which the offence of assaulting with intent to rob is made punishable by imprisonment not exceeding three years; with or without hard labour or solitary confinement. He was sentenced to six months' imprisonment, hard labour and solitary confinement; he escaped from custody under this sentence in July 1838, and he was indicted at the Assizes for the escape, *not* on the 1 & 2 W. IV. c. 44, s. 4, but on the 51 G. III. c. 63, s. 6. That Act(*a*) is applicable only to cases in which the offence, the subject of enactment, is a transportable offence; in such cases the court may substitute imprisonment with hard labour; and in such cases an escape is subject to the penalties of s. 6, and an easy mode of proving the previous conviction is allowed by s. 7. But *Meany's* original offence was committed after the 1 Vict. c. 87, came into operation, viz., after the 1st of October, 1837; and it was therefore not a transportable offence, and consequently, in the opinion of the learned Judge, the 51 G. III. c. 63, did not apply to his escape at all.

NINE JUDGES (*Woulfe*, C. B., *Pennefather*, B., and *Foster*, B., being absent), unanimously held that the conviction was bad, on the ground that the prisoner's escape was not such an escape as came within the provisions of the statute (51 G. III, c. 63) upon which the indictment was founded. For the same reason they held that the mode of proving the former conviction permitted by the same statute, (viz., the certificate) could not be allowed in this case(*b*).

(*a*) Vide s. 2.

(*b*) If the case had come within the 9 G. 4, c. 54, s. 21, the certificate would have been admissible.

May 1, 1839.

IN the Matter of a Presentment for PRINTING, County TIPPERARY.

A contract to perform the printing work of a county for one year, is warranted by the 6 & 7 W. 4, c. 116, s. 47.

An application for the printing work of the county of *Tipperary*, for the year 1839, was made at, and approved of by, the proper Presentment Sessions, the calculated amount being above £100, and the usual advertisement for sealed tenders and proposals to be opened by the grand jury at the following Assizes was published. Accordingly, several sealed tenders and proposals were sent in and opened by the Grand Jury; and the proposal of Mr. *Upton* to do the county printing work for one whole year, for the sum of £620, was accepted, and the presentment for that purpose came before *Crampton*, J., at the Spring Assizes of *Clonmel*, in 1839, to be fiated.

It was objected, that the contract should be from assizes to assizes only, and not for one whole year, as the contract in question was; and the learned Judge directed the presentment to be fiated, subject to the opinion of the Judges on that point(*a*).

Ten Judges (*Pennefather*, B., and *Richards*, B., being absent) unanimously decided in favour of annual contracts.

(*a*) See 6 & 7 W. 4, ss. 47, 131.

THE KING *v.* PETER DENENY.

June 4, 1839.

Cows are not *chattels* within the meaning of the 9 G. 4, c. 55, ss. 40, 41, 42.

PETER DENENY was tried before *Perrin*, J., at the Spring Assizes of *Roscommon* in 1839, upon an indictment which charged, in the first count, that he on the 15th of May 7 W. IV., at *Kilmore*, being then and there employed as a herd to one *James Coyne*, by virtue of such employment did take into his possession two cows, price £10 each, for and in the name of said *James Coyne*, and which cows he, the said *Peter Deneny*, did then and there feloniously embezzle, and the same feloniously did steal, take and drive away, against the peace and statute. The second count was the same as the first, stating the prisoner to be a servant. The third count stated, that he, the said *Peter Deneny*, feloniously did embezzle, and steal, take, and drive away, against peace and statute.

Upon the trial, the first witness, *James Coyne*, deposed, that the prisoner had a large quantity of cows and sheep belonging to witness in his charge as herd, which witness gave him charge of on the 15th of May. On the 20th, witness missed two cows and five sheep; the prisoner had absconded, and was not to be found. Witness saw the cows afterwards, one on the 25th of June, the other on the 4th of July, in possession of Mr. *Stafford*. Witness had not authorized the prisoner to dispose of them, and the prisoner never returned them as sold. On being cross-examined, the witness said that the prisoner had been seven years in his employment as herd, and that he did consider him at one time a man of good character.

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The second witness, *Michael Flanagan*, stated, that he was in Mr. *Stafford's* employment; he bought two cows from the prisoner in the fair of *Strokestown*, on 15th of May, for Mr. *Stafford*; the prisoner told witness, that one was his master's, and one his own; witness paid for them £8 15*s*., and £8 5*s*.

The third witness, *Michael Flanagan*, jun., said, that he was present when the cows were sold; these were the cows which Mr. *Coyne* saw and claimed on the 25th of June, and 4th of July.

The fourth witness, *John Stafford*, said, that he was present at the sale of the cows, and gave the £17 to *Flanagan* to pay for them, and saw the money paid.

Blakeney, for the prisoner, objected that this was not a case within the 9 G. IV. c. 55, ss. 40, 41, 42, cows not being chattels within the meaning of that statute. The learned Judge left the case to the jury, who found the prisoner guilty. But he respited sentence, and reserved the question for the consideration of the Judges.

TEN JUDGES having met (*Woulfe*, C. B., and *Pennefather*, B., being absent), all, except *Foster*, B., and *Richards*, B., held that the conviction was bad. Those two Judges held that it was good.

THE QUEEN *v.* JOHN BRADY and MICHAEL COONEY.

June 4, 1839.

At the Spring Assizes for the County of *Cavan*, in 1839, *John Brady* was tried before *Foster*, B., on the following indictment:—"The jurors for our Lady the Queen upon "their oath present, that *John Brady*, late of *Lara*, in "the county of *Cavan*, labourer, and *Michael Cooney*, late "of the same place, labourer, not having the fear of God "before their eyes, but being moved and seduced by the "instigation of the devil, on the 22nd day of July, "2 Vict., with force and arms, at *Aughagobrick* in the "county of *Cavan*, aforesaid, in and upon one *Marcus* "*Gervaise Beresford*, in the peace of God and of our "said Lady the Queen then and there being, feloniously, "maliciously, and unlawfully did make an assault, and "that the said *John Brady*, with a certain gun, of the "value of 5*s*., then and there loaded with gunpowder and "leaden slugs, which gun the said *John Brady* in both "his hands then and there had and held, feloniously, "wilfully, maliciously, and unlawfully, did shoot at the "said *Marcus Gervaise Beresford*, with intent, in so doing, "and by means thereof, to maim him the said *Marcus* "*Gervaise Beresford;* and that the said *Michael Cooney* "then and there wilfully, maliciously, unlawfully, and "feloniously was present, aiding, abetting, counselling, "and commanding the said *John Brady* the felony afore- "said, in manner and form aforesaid to do and commit, "against the peace of our said Lady the Queen, her "Crown and Dignity, and contrary to the form of the

An indictment charged the prisoner with shooting at M. B., with intent to maim and disable him, stating in one count that the gun was loaded with gunpowder and leaden slugs, and in another count with gunpowder and leaden shot. There was no evidence that any ball, slug, or shot had been found, or any wound inflicted; nor was it shown in what manner the gun had been loaded. The judge told the jury it was not necessary that they should be satisfied that the gun was loaded with slugs or shot, but that if they believed it was loaded with any substance calculated to act like slugs or shot, it was sufficient; and he left the case to the jury, to say upon the circumstantial evidence whether it was so loaded. The jury found the prisoner guilty. *Held*, that the conviction was right.

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"statute in that case made and provided." There was a second count, as follows:—"And the jurors aforesaid "upon their oath aforesaid do further present that the said "*John Brady*, being such evil disposed person as aforesaid, "on the said 22nd day of July, in the second year of the "reign of our said Lady the Queen, with force and arms "at, &c. in and upon the said *Marcus Gervaise Beresford*, "did feloniously, wilfully, maliciously, and unlawfully "make an assault, and that the said *John Brady*, with "a certain gun, of the value of 5*s*., then and there "loaded with gunpowder and leaden shot, which gun the "said *John Brady* in both his hands held, feloniously, "wilfully, maliciously, and unlawfully, did shoot at the "said *Marcus Gervaise Beresford*, with intent, in so doing, "and by means thereof, to disable the said *Marcus Gervaise* "*Beresford*, and that the said *Michael Cooney* then and "there feloniously, wilfully, maliciously, and unlawfully, "was present, aiding, abetting, counselling, and command- "ing the said *John Brady* the felony last aforesaid in "manner and form aforesaid to do and commit, against "peace and statute."

There were other counts laying the intent differently, but all laying the gun to be loaded in the manner before described.

When the case for the Crown was closed, counsel for the prisoner *Brady* submitted, that he was entitled to an acquittal, on the ground that no ball, slug, or shot, had been found, no wound inflicted, nor any evidence given as to the mode in which the gun had been loaded, or of its having been loaded with any thing beyond gunpowder, and they cited the cases of *Rex* v. *Whitley*, 1 Lewin, 123; and *Rex* v. *Hughes*,

5 C. &. P. 126. The learned Baron, upon this, conferred with *Pennefather*, B., who was joined with him in the Commission; and it appeared to them, with respect to the case of *Rex* v. *Hughes*, in 5 C. & P., that in that case two shots having been fired from two pistols, but the indictment having relation to only one of those pistols, and to one of those shots, a doubt was raised by the surgeon's evidence whether the only pistol which was in question in that indictment, had been loaded with any thing beyond wadding; and that it would appear from what *Bolland*, B., said, that if the question had arisen with respect to the other pistol, he would have left it (on a very slight circumstance) to the jury to say, whether it had been loaded with ball. The learned Judges came to the conclusion, that the proper course would be that *Foster*, B., should leave it to the jury to say upon the circumstantial evidence, whether the gun had been loaded in such a manner as to fit it for maiming or disabling; and that if they were satisfied of that, the mode of loading the gun stated in the indictment would, so far as the loading of the gun was concerned, justify a conviction. The learned Baron accordingly told the jury, that unless they should be satisfied that the gun was loaded in such a manner as to be fitted for maiming or disabling, whatever might be their views of the other parts of the case, they must acquit the prisoner; but he told them that in his opinion it was not necessary that they should be satisfied that the gun was loaded with either leaden slugs or leaden shot, for that if they believed it was loaded with any substance or substances usually employed in loading fire-arms, and calculated to act like leaden slugs or leaden shot in maiming or disabling, the description in the indictment was sufficiently "*ejusdem generis*" to sustain a conviction. He then told

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them that there was no direct evidence of the manner in which the gun was loaded; no ball was found, and no wound inflicted, and there was no witness who had seen it loaded; but his lordship added that, in the absence of direct proof, the mode of loading of the gun was, in his opinion, like any other fact, capable of being inferred from circumstantial evidence, if that evidence were perfectly satisfactory to the jury; and he submitted to them the following circumstances existing in this case.—First; The Rev. *M. G. Beresford* had sworn he was well accustomed to the use of fire-arms, and that he was within ten yards of the man when the shot was fired, and he said the report was loud, and proceeded from a gun that appeared to be heavily loaded. Secondly; The place was on the road by which Mr. *Beresford* ordinarily passed to the church where he usually officiated, and the time was a quarter of an hour before the commencement of Divine service. Thirdly; It was proved that the man who fired the shot, together with another man, each of whom had a gun, was lying concealed in the field by the road-side at the back of a hedge from whence the shot was fired, and had been lying there for about half an hour before the coming up of Mr. *Beresford* in his gig. Fourthly; Upon a car coming up immediately before Mr. *Beresford's* gig, the man who afterwards fired the shot stood up, looked over the hedge at the car, and lay down again after it had passed. Fifthly; That on Mr. *Beresford's* coming up, this man rose, looked over the hedge, and stepped to a gate which was close to where he was lying, and took aim at Mr. *Beresford* and fired. Sixthly; That both men immediately fled across the fields after the shot was fired. Seventhly; That being pursued, the man who had fired, stopped, reloaded his

gun, presented it at his pursuer, and told him that unless he would go back he would lay him down.

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The jury found the prisoner guilty, but the learned Baron respited sentence in order to obtain the opinion of the Judges upon the foregoing questions; and in reserving the case he referred their lordships to the following authorities; 1 Leach, 247; 1 Hawk. P. C., c. 15, s. 9; Russ. & Ry. 95; 1 Lewin, 123, 126; 5 Carr. & P. 126; Deacon's C. L. 834.

Ten Judges being present (*absentibus Woulfe*, C. B., and *Pennefather*, B.,) EIGHT of them (BUSHE, C. J., DOHERTY, C. J. C. Pleas, JOHNSON, J., BURTON, J., TORRENS, J., FOSTER, B., CRAMPTON, J., and RICHARDS, B.,) held that the conviction was right.—PERRIN, J., and BALL, J., held that it was wrong.

June 4, 1839.

THE QUEEN *v.* LUKE GAYNOR.

Indictment for perjury committed upon a trial for burglary. The perjury assigned was, that the prisoner swore upon that trial that he had not heard a certain conversation, whereas in fact he had heard it. To support the charge of perjury, informations were proved (by the evidence of one of the magistrates who took them,) in which the prisoner swore he had heard the conversation; and *two* witnesses, *one* of whom was the same magistrate who proved the informations, proved that the prisoner had sworn at the trial that he had not heard it. *Held*, that a conviction on this evidence was wrong.

THE prisoner was tried at the Spring Assizes for the Co. of *Meath*, in 1839, before *Torrens*, J., upon a charge of perjury. The indictment, after reciting the trial of *James Carolan*, *Patrick Geoghegan*, and *Peter Duff*, for burglary, at the Summer Assizes at *Trim*, in 1838, at which time the perjury was alleged to have been committed, proceeded thus:—"And the jurors aforesaid, &c., do say and present, "that upon the said trial of the said *James Carolan*, &c., "it then and there became and was material to inquire "whether he the said *Luke Gaynor* on the night mentioned "in the said indictment, to wit, on the night of the said "2nd day of April, in the said first year of the reign afore-"said, heard any talk between the said *Patrick Geoghegan* "and *Peter Duff*, charged in said indictment, about the "linen that was taken from the said *M. Connell's* house "that night, (meaning the night of the said 2nd day of "April in the year aforesaid) and also whether he the said "*Luke Gaynor* saw any linen divided that night in *Caro-*"*lan's* house (meaning the house of the said *James Carolan* "so charged in the said indictment); and the jurors afore-"said upon their oath aforesaid do further say and present, "that the said *Luke Gaynor* being so sworn as aforesaid, "not having the fear of God before his eyes, but being "moved and seduced by the instigation of the devil, and "contriving and intending that the said *James Carolan*, "*Patrick Geoghegan*, and *Peter Duff*, should be unjustly "acquitted of the said burglary and felony so charged in "said indictment, then and there on the said trial, upon his "oath aforesaid, falsely, corruptly, knowingly, wilfully, and

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" maliciously, before the said jurors so sworn as aforesaid,
" and before the said *John Doherty*, and *William Johnson*,
" justices and commissioners as aforesaid, did depose, swear,
" and give in evidence amongst other things in substance
" and to the effect following, that is to say, that he the
" said *Luke Gaynor* did not on the night mentioned in the
" said indictment, to wit, on the night of the said 2nd day
" of April, in the year aforesaid, hear any talk between the
" said *Patrick Geoghegan* and *Peter Duff* about the linen that
" was taken from the said *Matthew Connell's* house that
" night, and that he the said *Luke Gaynor* never said or
" swore that he the said *Luke Gaynor* heard the said *Patrick*
" *Geoghegan* and *Peter Duff* talk about the linen that
" night, meaning the night of the said 2nd day of April, in
" the year aforesaid, and that he the said *Luke Gaynor* did
" not see any linen divided that night in *Carolan's* house
" (meaning the house of *James Carolan* charged in said
" indictment); whereas in truth and in fact the said *Luke*
" *Gaynor* on the night mentioned in the said indictment,
" to wit, the night of the said 2nd day of April, did
" hear talk between the said *Patrick Geoghegan* and *Peter*
" *Duff* about the linen that was taken from the said *Mat-*
" *thew Connell's* house, and whereas in truth and in fact
" the said *Luke Gaynor* had theretofore and previously to
" the said trial as aforesaid, to wit, on the 11th day of
" April in the said first year of the reign aforesaid, before
" *George Despard*, *George M'Adams*, and *George Francis*
" *Blackburne*, Esqrs., three of her Majesty's justices of the
" peace in and for the County of *Meath*, (they the said
" *George Despard*, *George M'Adams*, and *George Francis*
" *Blackburne* then and there having sufficient power and
" authority to administer an oath in that behalf,) positively
" said and swore that he the said *Luke Gaynor* did hear

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" the said *Patrick Geoghegan* and *Peter Duff* talk about " the linen that night (meaning, &c.), and whereas in truth " and in fact he the said *Luke Gaynor* did see linen divided " that night (meaning, &c.), in *Carolan's* house, (meaning, " &c.); and so the jurors aforesaid upon their oath afore- " said do further say and present that the said *Luke Gay-* " *nor*, at the court of Assizes Sessions of *Oyer* and *Terminer* " and general gaol delivery of our said Lady the Queen, " holden at *Trim*, in and for the County of *Meath* " aforesaid, before the said *John Doherty* and *William* " *Johnson*, then and there being such justices and commis- " sioners as aforesaid, and then and there having sufficient " and competent power and authority to administer said " oath to the said *Luke Gaynor* in manner and form afore- " said, wilfully, wickedly, and corruptly did commit wilful " and corrupt perjury," &c.

On the part of the prosecution, the first witness was *George A. Pollock*, Esq. deputy clerk of the crown, who proved the record of the proceedings in the case of the *Queen* v. *Carolan* and others, and that the prisoners were acquitted. The second witness was *George Despard*, Esq., stipendiary magistrate for the County of *Meath;* who stated that he knew the prisoner *Luke Gaynor*, and identified him; remembered his having sworn informations before him and other magistrates respecting a burglary and robbery which had been committed at the house of *Matthew Connell*; looked at the informations which were shown to him, and stated that he read those informations to the prisoner, who perfectly understood them; he proved his own handwriting and the prisoner's mark to the informations; he was present at the trial of *Carolan* and others at the summer Assizes in 1838, and heard the prisoner *Luke*

Gaynor examined, when he swore "That he never heard "any talk between *Geoghegan* and *Duff* about the linen "stolen from *Matthew Connell's* house on the night he was "in *Carolan's* house, nor did he (the prisoner) ever say or "swear that he had heard such talk, nor did he see any "linen divided in the house of *Carolan* that night." Witness also said that he could state from memory, without looking at the informations, what the prisoner had deposed to before himself and the other magistrates, and what he swore on the trial of *Carolan*. The third witness was *J. W. Browne*, Esq.; he stated that he was employed in the Crown Solicitor's office; he attended the trial of *Carolan* and others at the Summer Assizes in 1838, and he stated, from a written memorandum taken at the time, that the prisoner *Gaynor* swore on that trial, "That he "never heard any conversation or talk about the linen "stolen from *Matthew Connell's* house between *Geoghegan* "and *Duff* on the night in question, nor did he ever say "or swear that he had, nor did he ever see any linen "divided in *Carolan's* house that night."

The case for the crown having closed, *F. Brady*, for the prisoner, called upon the learned Judge to direct the jury to acquit him, upon the grounds, first, that there was no evidence to shew which of the two statements by the prisoner was the false one; and secondly, that there was no second witness to the offence, the matter alleged as perjury having been contradicted by the evidence of Mr. *Despard* alone. He relied upon the following authorities; *Rex* v. *Perrot*, 2 M. & S. 379, 385, 392; *Rex* v. *Harris*, 5 B. & Al. 926; *Jackson's case*, 1 Lewin, 270; *Roscoe* on Ev. 688; *Wheatland's* case, 8 C. & P. 238; *Muscot's* case, 10 Mod. 192; *Rex* v. *Nunez*, Cas. T. Hard. 265; 2 Str. 1403, S. C.;

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Rex v. *Broughton*, 2 Str. 1230; 2 Chit. C. L. 312. He also observed upon the case of *Rex* v. *Knill*, referred to in 2 Russ. on Cr. 545, and reported in a note to *Rex* v. *Harris*, 5 B & Al. 929, as not applicable, because it did not appear that the objections were made at the trial, and the court therefore was bound to presume that the necessary evidence was sent to the jury, and the verdict properly found; and upon the *Rioters'* case, referred to *ibid.*, (and reported in 5 B. & Al. 939, *n.*) as inapplicable for the same reason, and also as carrying little weight, because *Chambre*, J., from whose note-book it was taken, expresses in the same passage an opinion in favour of the very form of indictment which was held bad in *Rex* v. *Harris*, and it was very probable that the indictment in the *Rioters'* case was in that defective form.

The learned Judge refused to direct the jury to acquit the prisoner, and told them that if they believed the evidence, the indictment was, in his opinion, sustained in point of law. The jury found the prisoner guilty; and sentence of one month's imprisonment, and after that, of transportation for seven years, was pronounced. The prisoner's counsel, however, continuing to entertain a strong opinion upon the case, his lordship subsequently reserved the case for the opinion of the Judges.

NINE JUDGES (*absentibus Woulfe*, C. B., and *Pennefather*, B.; *Torrens*, J. *dissentiente*), were of opinion that the conviction was wrong.

THE QUEEN *v.* ALEXANDER CHARLETON. *June* 4, 1839.

On a trial for bigamy, where the first marriage took place in Scotland, it is not necessary that the validity of that marriage should be proved by a person conversant with the laws of Scotland; but it is sufficient if the jury believe that there was in fact a valid marriage according to the laws of that country.

THE prisoner was tried before *Thomas M'Donnell*, Q.C., at the Spring Assizes for the county of *Monaghan*, in 1839, for bigamy; the charge being, that he married *Mary Carlisle*, whilst his former wife, *Margaret Phelps*, was alive.

The first witness was *Barbara Kirk*, who stated that she knew the prisoner *Alexander Charleton*; she also knew *Margaret Phelps*; was present at the marriage of the prisoner and *Margaret Phelps*, at *Dumferline*, in *Scotland*, in the year 1824; they were first proclaimed; they were married by Mr. *Thompson*, the clergyman of the parish of *Dumferline*; they stood and took one another's hands, and then Mr. *Thompson* pronounced the blessing, and declared them man and wife before God and man; it took place in Mr. *Thompson's* (the minister's) house; was called on by the prisoner himself to be a witness to the marriage; Mr. *Thompson* called his servant maid down, and said there were too few there; saw them married and bedded; saw them after their marriage; they lived at *Rosebank*; they lived afterwards as man and wife for twelve years; the prisoner called her Mrs. *Charleton*. On being cross-examined, this witness said, that the marriage was in the minister's house, and not in the kirk; witness had lodged in the same house with *Alexander Charleton*, before the marriage, for six months; *Rosebank* was three miles off from where witness lived; witness did not see them after that night for some years; did not recollect whether she saw them more than four times during the twelve years.

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The second witness was *William Clarke*, who said that he was the son of *Margaret Phelps*; she was then called Mrs. *Clarke*; his father was dead; she and the prisoner, *Alexander Charleton*, afterwards lived together as man and wife; they commenced to live together in 1824; before that, she bore the name of Mrs. *Clarke*, and afterwards the name of Mrs. *Charleton*; heard her addressed by that name, and by the prisoner himself; they lived in the same house together for about twelve years. The prisoner left the house in which he lived about two years ago.

The third witness was the Rev. *John Blakeney*, who stated that he was a clergyman of the Presbyterian church in *Monaghan*; he received his collegiate education in *Glasgow*, for four sessions, in order to qualify him for the Presbyterian church. He was then asked whether he was acquainted with what constituted a valid marriage, according to the laws of *Scotland*.—*R. Holmes*, for the prisoner, objected that the witness was not competent to prove the law of *Scotland*, which could only be done by a person who, from his education, was presumed to be conversant with that law. The learned Judge thought the evidence inadmissible, and it was rejected.

A book, purporting to contain extracts of the ecclesiastical discipline in the *Scotch* church, was then handed to the witness, in order to prove therefrom the law of marriage in that church; this was also objected to, and the learned Judge rejected it.

The fourth witness was the Rev. *William Henry Pratt*, who stated that he was rector of the parish of *Donogh* in the county of *Monaghan*, and had been so for twenty-three

years; he celebrated a marriage between the prisoner and *Mary Carlisle*, on the 24th of February, 1838, in the parish church of *Glasslough*, in the county of *Monaghan*; witness produced the parish register, and read an entry of the marriage therein by witness, by licence, which entry was signed by the prisoner and *Mary Carlisle*. On being cross-examined, he said that he had not his license in court; did not know whether the parties were Protestants; knew the woman for several years; she was a Presbyterian.

The fifth witness was *William Walker*, who said that he was clerk of the parish of *Donogh*; proved his hand-writing to the entry of the marriage; was present at the marriage of the prisoner and *Mary Carlisle*.—The case for the crown here closed.

Holmes, for the prisoner, submitted, that the first marriage having taken place in *Scotland*, it was necessary to prove that it was a valid marriage according to the laws of that country, which could only be proved by a person conversant with those laws; and that as no legal evidence had been given to shew that it was a valid marriage according to the law of *Scotland*, the learned Judge should direct the jury to acquit the prisoner. But after consulting with *Burton*, J., on the point, the learned Judge left the case to the jury, with a direction that as there was no controversy as to the second marriage, the question they would have to consider was, as to the fact of the first marriage; that in order to constitute the offence of bigamy, it was necessary that there should have been a previous valid marriage according to the law of *Scotland*; and that if they believed upon the evidence that there was in fact a marriage between the prisoner and *Margaret Phelps*, according to the law of

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Scotland, they should find the prisoner guilty; if not, they should acquit him.

The jury found the prisoner guilty; but the learned Judge reserved the point on the objection taken by *Holmes*, and on his application and on the consent of the crown, the prisoner entered into security to appear at the next assizes, and surrender himself to abide judgment.

EIGHT JUDGES (*Woulfe*, C. B., and *Pennefather*, B., being absent; *Foster*, B., and *Perrin*, J., *dissentientibus*,) held that the conviction was right(*a*).

(*a*) See this case reported upon other points, in 1 Cr. & Dix's Circuit Cases, 315; and 2 Jebb & S. 54.

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THE QUEEN *v.* WILLIAM OULAGHAN.

After the prisoner had been given in charge, it appeared that the prosecutrix, a child of four years of age, did not sufficiently understand the nature of an oath; and it was admitted on the part of the crown, that there was no other evidence to sustain the case. *Held*, that the prisoner was entitled to an acquittal.

THE prisoner was indicted at the commission of *Oyer* and *Terminer* and general gaol delivery for the city of *Dublin*, at Green-street, in April, 1839, for that he, on the 28th of January, 1839, did assault *Anne Watson*, of the age of four years, with intent to carnally know and abuse her, against the peace and statute. The second count was for a common assault.

The jury were sworn, and the traverser was given in charge; but before any witness was sworn, it appeared that the child (*Anne Watson*,) who was produced as a witness, was an infant of about four years of age, and it did not appear to the court that she sufficiently understood the nature of the obligation of an oath. The Court, after a

careful examination of the child, ultimately decided that she should not be sworn. On the part of the prosecution, an application was made that the jury should be discharged, and the case allowed to stand over till the child should be further instructed as to the nature and obligation of an oath.

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On the part of the prisoner it was insisted, that having been given in charge to the jury, he was entitled to his acquittal.

The counsel for the crown admitted that they had no evidence to sustain the case, unless the court should allow *Anne Watson* to be sworn as a witness. The court ultimately determined upon reserving the case for the consideration of the Judges, and discharged the jury, obliging the prisoner to enter into a recognizance, with sufficient sureties, (which he did,) to appear to take his trial at the next commission, if required so to do. *Richards*, B., one of the Judges who presided at the commission, submitted the case to the Twelve Judges, in order to ascertain whether in their opinion the traverser was entitled to his acquittal, or whether the Court was justified under the circumstances in discharging the jury, and whether they were authorized to bind over the traverser to appear and take his trial at the next commission; and if the Judges at the commission were wrong in not directing the jury to acquit the traverser, what course should then be pursued?

TEN JUDGES (*Woulfe*, C. B., and *Pennefather*, B., being absent,) unanimously gave their opinion that the prisoner ought to have been acquitted, and that he should be recommended for a pardon.

June 26, 1839.

In the Matter of OFFICERS' FEES upon ROAD TRAVERSES.

A fee to the judge's crier, upon the entry of each road traverse for damages, is legal, notwithstanding the 6 & 7 W. 4, c. 116, s. 110.

Quære as to the legality of a fee to the clerk of the crown under the same circumstances.

At the Spring Assizes for the county of *Clare*, in 1839, and also at the Summer Assizes of 1838, a question was raised before *Richards*, B., by Sir *Lucius O'Brien*, bart., foreman of the grand jury, in respect to the right of the clerk of the crown to charge a fee of one guinea upon the entry of each traverse for damages upon certain new lines of road laid out in that county. In order to submit the matter to the consideration of the Judges, the learned Baron requested the clerk of the crown for the county of *Clare* to send him a statement of the grounds upon which he rested his claim to the fee in question, which he accordingly did(*a*), and upon reading over this statement, the learned Baron observed that his crier had received a fee of

(*a*) These grounds were substantially the same as those urged in the case of the *Fermanagh Road Traverse*, ante, 222. The statement concluded with a copy of a case laid before *Jonathan Henn*, Q. C., and his opinion thereon, which were as follows:—

Case on behalf of Mr. George Sampson, clerk of the crown, Co. Clare, for the opinion of counsel on the following question:—

"When a traverse for damages was entered by any person with the clerk of the crown, it was and has been always the custom for the person so entering such traverse to pay the clerk of the crown a fee of One Guinea for entering same, bringing it forward for trial, recording the finding of the jury, and certifying same to the treasurer. This fee has of late been disputed, and querist wishes to be informed if he has a right still to charge it. Querist does not know under what statute this fee has been charged, but it has been paid according to long usage and custom, and some of the Judges said it was a fee given by ancient usage and custom. Mr. Baron *Pennefather*, when the question was brought before him at an Assizes in Limerick, gave his opinion that the officer was entitled to the fee by usage and custom, although there may not be any legislative enactment to warrant it. Querist refers to some of the statutes relative to traverses: 36 Geo. III. c. 55, s. 43; 3 & 4 Wm. IV. c. 78, s. 52; 6 & 7 Wm. IV. c. 116, s. 133 (general traverses), s. 134 (for damages)."

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five shillings upon each of the traverses. The questions reserved, therefore, were, first—whether the clerk of the crown is entitled to the fee of one guinea, or to any other fee, upon the entry of traverses for damages with him; reference being had to ss. 110, 112, 133, and 134, of 6 & 7 Wm. IV. c. 116, and schedule S. to that Act annexed; secondly, whether the judge's crier is entitled to the fee of five shillings, or to any other fee upon such traverses; reference being had to s. 110 of 6 and 7 Wm. IV. c. 116, and schedule S. of that Act.

EIGHT JUDGES, (*Woulfe*, C. B., *Doherty*, C. J. C. Pleas, *Pennefather*, B., and *Perrin*, J., being absent,) unanimously held that they would not decide summarily upon the claims of the clerk of the crown; and that as to the fee of the crier, it was legal, as already decided upon a case reserved by *Bushe*, C. J., in 1837(*a*).

OPINION.

"As to the fee of one guinea for traverses, that can be only claimed (if at all) on traverses for damages; no fee can be claimed upon traverses given by s. 133 of the 6 & 7 Wm. IV. If this fee of one guinea has been usually received as the fee on traverses for damages ever since they were introduced by the statute, I think the clerk of the crown is now entitled to demand it, although I cannot find any statute expressly conferring the right to receive this fee; but several acts have recognized the right of officers to fees not given by any statute, and if I mistake not, compensation has been allowed from time to time for such fees. I find by an old statute, 4 Geo. I. c. 8. s. 1, which has not, that I know of, been repealed, that all officers are required by the 1st section, on or before the 25th of March, 1718, to return to the clerk of the council a list or table of all fees claimed to be due and payable to them. But by s. 2 all clerks of the crown are required to set up a duplicate of the list of fees in open court. Has this not been latterly complied with? perhaps some of the lists originally returned by the clerks of the crown might be discovered on a search in the proper office. I do not know whether the papers of this office have been preserved, nor whether they are accessible, but I should recommend the querist to have some inquiry made in order to see whether this fee was then claimed for any similar duty."

"JONATHAN HENN."

(*a*) *Vide ante*, 222.

June 26, 1839. In the Matter of a Presentment for SURGEONS of the COUNTY CLARE INFIRMARY.

A presentment of £300 a year for two surgeons of a county infirmary, out of the funds of the institution (which funds consisted of money supplied by presentment, of public money under the 5 G. 3, c. 20, and of subscriptions), is illegal.

At the Spring Assizes for the county of *Clare*, in 1839, a presentment was claimed for the House of Industry, and the Grand Jury granted a sum of £600 under the 6 and 7 Wm. IV. c. 116, s. 85, for the support of that institution, until the Summer Assizes of 1839.

On looking into the accounts of the institution, which, by the 85th section of the Act, are directed to be laid before the presenting sessions, &c., *Richards*, B., (the Judge of Assize,) observed that the surgeons to the infirmary (two having been appointed,) were allowed out of the funds of the institution £300 a-year, viz., £150 a-year to each. The funds of the institution consisted, first, of annual subscriptions and donations; secondly, of money granted by presentment under the 85th section of the 6 & 7 Wm. IV. c. 116; thirdly, of £94 a-year, under the 86th section of the same Act; and fourthly, of £100 a-year Irish, out of the consolidated fund, under the 5 Geo. III. c. 20, s. 5. It appeared that the presentment for £94 a-year, (that is, £47 at each assizes,) under s. 86 of the Grand Jury Act, was not paid over specifically to the surgeons of this infirmary, but was received by the treasurer, and brought to the general credit of the institution, and formed part of the general funds out of which the surgeons received £300, as before mentioned; neither was the £100 a-year Irish, which was paid at the treasury under the 5 G. III. c. 20, s. 5, received by the surgeons themselves, but by the treasurer, and by him brought to the general credit of the institution.

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The 5 G. III. c. 20, was the Act that established county infirmaries throughout Ireland, and it appeared to the learned Baron, by the 5th section of that Act, that the legislature did not at that time contemplate or intend that the surgeon to such an institution should receive more than the £100 a-year Irish. On the passing of the late Grand Jury Act, 6 and 7 Wm. IV. c. 116, the legislature permitted (by s. 86,) a sum of £47, at each assizes, to be raised by county presentment, and paid over to the surgeon of the county infirmary; but by the same section it is declared, that the surgeons of the infirmary or hospital shall not be entitled to any presentment for the above-mentioned sum of £47, unless such surgeon "shall have given his attendance and professional assistance without any other or "further fee or reward to the prisoners and others in the "gaol of the county," &c. There was a physician to the gaol at a salary of £46 3*s.* 1*d.* a-year, British. The surgeons to the county of *Clare* infirmary were in the habit of being called in to attend, and of attending the prisoners in the gaol, as occasion required. The learned Baron doubted, however, whether the appropriating so very large a sum as £300 a-year to the surgeons of the infirmary of a second class county, out of the funds of that institution, was not at variance with the intent and meaning of the 5 Geo. III. c. 20, and 6 & 7 Wm. IV. c. 116. In the county of *Kerry*, also a second class county, the surgeon to the infirmary never received any thing from the funds of the institution, or from the county, but merely £100 a-year, Irish, under the 5 Geo. III. c. 20, s. 5.

The learned Baron therefore reserved the following questions for the consideration of the Judges: first, were the surgeons of the county of *Clare* infirmary, under the cir-

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cumstances above stated, entitled to the sum of £47, under s. 86 of the Act, or should the Court have refused to pass such presentment either in their names or in the name of the treasurer of the infirmary? Secondly, had the governors of the infirmary a power to grant, and were the surgeons of the infirmary entitled to receive, any annual allowance or compensation out of the funds of that institution, consisting, as it did, partly of money supplied by presentment on the county, partly of public money under the 5 Geo. III. c. 20, and partly of subscriptions? Thirdly, if the governors of the county infirmary had a power to allow what salary or salaries they pleased to the surgeons thereof, was the allowance in the above case so unwarrantably excessive as to call upon the Judge to refuse to pass the presentment for the infirmary, or to warrant him in so doing, unless an engagement was given that the salaries of the surgeons should not be continued in future at so very high a rate; or had the Judge any discretion on the subject?

EIGHT JUDGES (*Woulfe*, C. B., *Doherty*, C. J. C. Pleas, *Pennefather*, B., and *Perrin*, J., being absent,) unanimously held that the presentment of £300 a-year to the surgeons of the infirmary was altogether unwarranted and illegal.

IN the Matter of Presentments for DISPENSARIES and FEVER HOSPITALS, in the Counties of KERRY and CLARE. *June* 26. 1839.

SEVERAL questions having been raised during the Spring Assizes of 1839, in the different counties upon the *Munster* circuit, upon the construction of the 6 & 7 W. IV. c. 116, so far as the Act relates to the several medical charities, the subject of that Act, *Richards*, B., submitted the following cases and queries to the consideration of the Judges:—

Where a dispensary has been established, and all the requisites prescribed by section 81 of the 6 & 7 W. 4, c. 116, performed, it is obligatory on the grand jury to make the presentment required by that section; and they cannot refuse to make it, on the ground that they consider it unnecessary.

In the case of *fever hospitals*, the grand jury have a discretion to present less than the amount of private subscriptions, under s. 81 of the 6 & 7 W. 4, c. 116.

Quære, whether they have any such discretion in the case of *dispensaries?*

A presentment at a Summer Assizes for a lunatic asylum depot, not connected with any house of industry, is bad under s. 89 of the 6 & 7 W. 4, c. 116.

1st Case (reserved on application for a sum of £20 15*s.* for a dispensary at *Dunbeg*, county of *Clare*; and for another sum for another dispensary in the county of *Kerry*, under similar circumstances).—Where a sum of money has been advanced by private subscription or donation, for the purpose of setting up or establishing a dispensary, and where a presentment for a similar sum has passed the presenting sessions, and where the doctor appointed to the dispensary has lodged with the secretary of the Grand Jury the declaration contained in the latter part of the 86th sec. of 6 & 7 Wm. IV. c. 116, and where the amount of the subscriptions has been vouched by the oath of the treasurer, pursuant to s. 81, and a proper certificate obtained, certifying that the doctor resides within five statute miles of the dispensary; in other words, where all the formal requisites to sustain the application have been complied with; is it obligatory in such a case on the Grand Jury to grant the required presentment under the 81st section of the Act?

The Grand Juries of the counties of *Clare* and *Kerry*

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insisted that the word "established," as used in the 81st section, could not apply to a dispensary only in progress of being set up, and that until it has been established, and substantial relief afforded under it, the county cannot be called on to contribute. But *quære*, could that objection be taken at the assizes, and after the presentment had passed the sessions?

2nd Case.—In the case of the dispensary of *Lisheencava*, in the county of *Kerry*, it appeared that a sum of £88 3*s*. had been subscribed by individuals, and that £15 of that sum had been applied in fitting up, purchasing medicines for, and in fact in establishing the dispensary, leaving a balance of subscription in the hands of the treasurer of £73 3*s*.; and it further appeared that the formal requisites of the Act had been complied with, and that sixteen persons had received dispensary relief between the opening of the dispensary and the period of applying for a presentment for the same at sessions; and that a presentment had passed the presenting sessions. Many of the Grand Jury were unwilling to pass this presentment, thinking the dispensary in that neighbourhood unnecessary. *Quære*—was the Grand Jury in this case bound to pass the presentment under the 81st section of the Act, or could they in their discretion reject it?

3rd Case.—Where the dispensary has been regularly established, and the requisites of the Act complied with in all respects, and a presentment for a particular sum "equal" in amount to the subscriptions approved of at sessions; *quære*, have the Grand Jury a right to reduce the amount of such presentment, and to present a lesser sum than the amount of the private subscriptions and donations; or are they

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bound by the Act (s. 81,) to present for that sum, if the presenting sessions have approved of a presentment for that amount, and if such presentment be in other respects regular and formal?

4th Case.—With respect to fever hospitals, where the presenting sessions have presented a sum not exceeding the amount of private subscriptions and donations, pursuant to the 81st section, have the Grand Jury a power to reduce that sum in their discretion, if they think it too much, or too wastefully applied or disposed of?

5th Case.—A presentment passed the Sessions previous to the Spring Assizes for the county of *Kerry*, in 1839, for the sum of £49, for the lunatic asylum depôt in *Tralee*, under the 89th section of the Grand Jury Act. There was a district lunatic asylum to which the county *Kerry* contributed its proportion, by presentment, and the lunatic asylum depôt, in *Tralee*, did not appear to be in any way connected with, or under the direction of, any house of industry. *Quære*—Whether under these circumstances the Grand Jury could pass a presentment, at any time, for such lunatic asylum depôt, and could they pass any such presentment at the Spring Assizes?

EIGHT JUDGES (*Woulfe*, C. B., *Doherty*, C. J. C. Pleas, *Perrin*, J., and *Richards*, B., being absent,) unanimously agreed upon the following answers.—To the questions put by the first and second cases: that the Grand Jury were bound to make the required presentments.—To the question put by the fourth case: that the Grand Jury had a power to reduce the sum.—To the question put by the fifth case:

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that the presentment in that case was bad.—The consideration of the third case was postponed(*a*).

(*a*) See the case of the *Queen's County Dispensary Presentments, ante,* 130, where the same question as that raised by the third case was decided upon the 58 G. 3, c. 47.

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JOHN ORR, Appellant; JAMES LAVERY, Respondent.

A decree was made for a plaintiff in a civil bill replevin on the non-appearance of the defendant. The defendant afterwards appearing during the sessions, the assistant barrister allowed him to enter his appearance *nunc pro tunc*, for the purpose of appealing, and in the mean time directed the decree not to issue. On the hearing of the appeal, the plaintiff admitted he had no evidence, and the decree was reversed. *Held*, that under these circumstances the Judge before whom the appeal was heard had power to order the replevin bond to be assigned to the defendant, under the 6 & 7 W. 4, c. 75. ss. 13, 14.

THIS was an appeal from a decree upon a replevin by civil bill brought by the respondent under the statute 6 & 7 Wm. IV. c. 75, s. 8, against the appellant, for making an improper distress. On the hearing of the civil bill before the Assistant Barrister for the county of *Antrim*, the appellant not having appeared, a decree was accordingly made for the respondent; but the appellant having afterwards appeared (during the sessions,) to oppose the respondent's demand, the Assistant Barrister allowed his appearance to be taken as at the hearing, and to be entered by the clerk of the peace, for the purpose of enabling him to appeal from the decree; and in the mean time directed the decree not to issue.

On the appeal being called on before *Burton*, J., at the Spring Assizes at *Carrickfergus*, in 1839, both parties appeared by their attorneys and counsel, and the counsel for the respondent (the plaintiff in the civil bill,) was called on to support his case; but he admitted that he had no evidence upon which his case could be supported, and conse-

quently the decree was reversed. *Napier*, for the appellant, then required that the replevin bond should be directed to be assigned to the appellant, (the defendant in the civil bill case,) under the 6 & 7 W. IV. c. 75, ss. 13, 14. This was objected to by the counsel for the respondent, who contended that the Judge had no authority under the above circumstances to direct such an assignment. The learned Judge reserved the point for the consideration of the Judges.

SIX JUDGES out of eight present (*Woulfe*, C. B., *Doherty*, C. J. C. Pleas, *Pennefather*, B., and *Perrin*, J. being absent; *Bushe*, C. J., and *Crampton*, J., *dissentientibus*,) held, that the Judge had power to make the order in question for the assignment of the replevin bond(*a*).

(*a*) See this case reported (*nom. Orr*, Appellant; *Raverty*, Respondent) in 1 Cr. & Dix's Circuit Cases, 254.

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THE QUEEN *v.* JOHN GREEN.

Conviction for forgery. The indictment stated, that the prisoner falsely altered a receipt for rent, which previously to such alteration was as follows: "Ennis, 3d of April, 1837. Received from J. & J. G. £7 7*s.* 7*d.* on account of rent," &c. "as at foot. *P. Curtin.* Dec. 3, Cash per J. G. £3 6*s.*; Cash this day, per do. £4 1*s.* 7*d.* total, £7 7*s.* 7*d.*" The alteration was effected by erasing the lines following the words "*P. Curtin.*" The indictment did not state any further circumstances showing that such an erasure constituted a forgery; but it appeared in evidence that two separate receipts had been previously given for the two sums mentioned in the erased lines, and that the prisoner's object was to get credit for the other sum as a separate payment. *Held*, that the conviction was right.

Semble, that reading out a document, although the party refuses to *show* it, is a sufficient uttering.

THE prisoner was tried and convicted before *Greene*, Serj. at the Spring Assizes for the County of *Clare*, in 1839, upon an indictment for forgery. The first count stated that the prisoner "feloniously did falsely make, forge, and "counterfeit, and feloniously did cause and procure to be "falsely made, forged, and counterfeited, and feloniously "did act and assist in the false making, forging, and "counterfeiting, a certain receipt and acquittance for rent, "which said receipt and acquittance for rent is as follows, "that is to say; '*Ennis*, 3rd of April, 1837. Received from "'*James* and *John Green* seven pounds seven shillings and "'seven pence sterling on account of rent of their hold-"'ing at *Bealcraggy*, as at foot. *P. Curtin.*—£7 7*s.* 7*d.*:' "with intent to defraud one *Patrick Curtin*," against the peace and statute. The second count was for knowingly altering and publishing a similar forged document with a similar intent. The third count stated that the prisoner "did feloniously and falsely alter, and feloniously cause to "be altered, &c., a certain receipt and acquittance for rent, "which said last mentioned receipt and acquittance for rent "was previously to said false alteration as follows, that is to "say, '*Ennis*, 3rd of April, 1837. Received from *James* and "'*John Green*, £7 7*s.* 7*d.* sterling, on account of rent "'of their holding at *Bealcraggy*, as at foot.

"'P. CURTIN.

" ' Dec. 3, 1836,

" ' Cash per *John Green*, . . £3 6 0

" ' Cash this day per do. . . 4 1 7

£7 7*s.* 7*d.*'

" which said last mentioned receipt and acquittance for " rent was then and there in the possession of the said " *John Green*, by falsely obliterating and erasing the fol- " lowing words and figures ;—

" Dec. 3, 1836,

" Cash per *John Green*, . . £3 6 0

" Cash this day per do. . . 4 1 7

£7 7*s.* 7*d.*

" which said so falsely altered receipt and acquittance for " rent is as follows ; ' *Ennis*, 3rd of April, 1837. Received " ' from *James* and *John Green* £7 7*s.* 7*d.* sterling, on " ' account of rent of their holding at *Bealcraggy*, as at " ' foot ; *P. Curtin.* £7 7*s.* 7*d* ;' with intent to defraud the " said *Patrick Curtin*," against the peace and statute. The fourth count stated that the prisoner having in his possession a falsely altered receipt (in the same words as that stated in the 1st count) did knowingly alter and publish the same, with intent to defraud *P. Curtin.* The fifth count charged, generally, the forging, and the sixth, the uttering, a receipt for rent for £7 7*s.* 7*d.* with a like intent.

The facts of the case were these :—The prisoner and his father, *James Green*, had been servants to *Patrick Curtin*, the prosecutor, of part of the lands of *Bealcraggy*. He had passed to them a stamped receipt, which, as the prosecutor swore,

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was originally in these words, "*Ennis*, April 3rd, 1837. "Received from *James* and *John Green* £7 7*s.* 7*d.* sterling, "on account of the rent of their holding, at *Bealcraggy*, as "at foot.

"*P. Curtin.*

"1836, Dec. 3, Cash per *John Green*, .	£3	6	0
"Cash this day per do. .	4	1	7
	£7	7	7."

The prosecutor's father swore that he had given separate unstamped acknowledgments, one for the £3 6*s.*, dated Dec. 3rd, 1836, and one for the £4 1*s.* 7*d.* These were produced and indentified. The amount of the year's rent was £7 7*s.* 7*d.* In December, 1838, the prisoner made a tender to the prosecutor on account of the year's rent due the 1st of May previous, which the prosecutor declined to receive, it being alleged to be short in amount. On the 18th of December following, the prisoner tendered to the prosecutor a sum of £2 19*s.* 10*d.*, the balance of the rent due to the 1st of November, 1838, according to an account furnished by the prisoner; claiming certain credits. The prosecutor and prisoner entered into the accounts, and the prisoner produced documents to vouch the credits he claimed. Amongst these was the receipt in question. The prosecutor asked the prisoner to show him the vouchers, but he said he would not shew his papers to any man but his attorney; and he called out the sums which he alleged they vouched. In this way he claimed credit for the amount of the receipt in question, and also of the two unstamped receipts for the sums of £3 6*s.* and £4 1*s.* 7*d.* The prosecutor afterwards saw the receipt for £7 7*s.* 7*d.*, and having obtained possession of it, handed it to a police-

man. It was produced, and it appeared that the two lines "1836, Dec. 3rd, cash per *John Green* £3 6*d.*, cash this "day £4 1*s.* 7*d*," had been erased, and the tot, £7 7*s.* 7*d.*, remained as it originally was; and the prosecutor swore, that those two lines had been in the receipt when he signed it.

Freeman, for the prisoner, made two points; 1st, That there was no uttering of the forged receipt within the meaning of the Act of parliament(*a*), the prisoner having refused to shew the receipt; and he cited *Wooldridge's* case(*b*), and *Rex* v. *Shukard*(*c*), in which it was ruled that the mere shewing of a forged instrument with the view of raising a false idea of a man's wealth was not an uttering within the 13 Geo. III. c. 79. Secondly, That the indictment was insufficient, as not containing an averment that the two lines alleged to have been erased were acknowledgments or vouchers for the payment of two sums making together the £7 7*s.* 7*d.*, and that such sum of £7 7*s.* 7*d.* was the same £7 7*s.* 7*d.* as appeared at the bottom of the receipt; and an averment, that such two payments were evidenced by other receipts which the prisoner had used as well as the receipt in question, so as thereby to attempt to gain a double credit. That the receipt, as produced, appeared to be perfect, the words "as at foot," agreeing with and having reference to the £7 7*s.* 7*d.* which was the alleged total of the two smaller sums; and that the facts should have been stated which shewed the alteration so as to constitute a forgery; for that where a fact extrinsic to the instrument itself is necessary in order to shew it to be a forgery, such fact must be

(*a*) 39 G. 3, c. 63, s. 1. (*b*) 1 Leach, 307.
(*c*) Russ. & Ry. 200.

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specially averred, as in *Hunter's* case(*a*), and *Thompson's* case(*b*).

As to the first point, the indictment having contained counts for the actual forgery, and the jury having found the prisoner guilty on all, it became unnecessary to decide upon it, although the learned Judge thought there was a sufficient uttering. The second question his lordship thought it right to reserve for the consideration of the Judges; although the bearing of his opinion at the time was, that the indictment was sufficient.

EIGHT JUDGES (*Woulfe*, C. B., *Doherty*, C. J. C. Pleas, *Pennefather*, B., and *Perrin*, J., being absent), unanimously held that the conviction was good.

(*a*) 2 Leach, 624. (*b*) 2 Leach, 910.

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THE QUEEN *v.* GEORGE ROBINSON and MICHAEL ROBINSON.

On the trial of an accessary before the fact to a felony, the proper evidence of the conviction of the principal felon at a former assizes for the same county, is a record of the conviction, and not the crown book.

THE prisoners were tried at the Summer Assizes of *Athy* for the County of *Kildare*, in 1839, before *Johnson*, J., on an indictment charging them as accessaries before the fact to a burglary and robbery committed in the dwelling house of the Rev. Mr. *Roberts*, in that county, in the month of March, 1838. The principal felon (a man of the name of *Michael Flanagan*) was tried at the previous Spring Assizes for the same county, on an indictment for burglary and robbery, upon which he was found guilty, and sentenced to transportation; and from various facts and circumstances

which were divulged on his trial, it was considered advisable to proceed against the two *Robinsons* as accessaries, and they were accordingly tried as such at the subsequent Assizes.

The first piece of evidence offered on this trial on the part of the crown was the conviction of the principal felon, which was proved by the production of the crown-book of the previous Assizes by the clerk of the crown, containing the usual entries of the indictment, plea, trial, and conviction of *Flanagan* the principal, and the subsequent judgment of the court pronounced upon him. The reception of this evidence was objected to by the counsel for the prisoners, on the ground that the legal mode of proving the conviction should have been by the production of a *record* regularly made up and attested by the proper officer. But on hearing the arguments offered by the counsel for the crown, who stated, amongst other things, that it had been the constant and invariable practice of the circuit, when the trial of the principal felon had taken place at a previous Assizes held for the same county, to prove the conviction in the same manner as it had been done in the present case, and that such evidence had always been received by the court, the learned Judge admitted the evidence, and the prisoners were both convicted, on clear and satisfactory testimony, of the offence with which they were charged.

The prisoners subsequently presented a memorial to the Lord Lieutenant, praying their discharge, inasmuch as they were advised that the conviction was bad in law; and the memorial having been referred to *Johnson*, J., as the Judge who tried the case, his lordship recommended a respite of the sentence, which was respited accordingly, for

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the purpose of obtaining the opinion of the Twelve Judges on the point made by the prisoners' counsel, whether the evidence in question ought to have been received, and if it should not, what course should be taken respecting the prisoners.

NINE JUDGES (*Woulfe*, C. B., *Torrens*, J., and *Richards*, B., being absent), unanimously held that the conviction was wrong(*a*). *Johnson*, J., accordingly recommended the prisoners for a pardon.

(*a*) The following authorities were amongst others considered by the Judges in giving their opinion:—2 Phill. Ev. 623-8, (Ed. 1838); Peake on Ev. 36, 49; *Rex* v. *Bowman*, 6 C. & P. 101; *Rex* v. *Smith*, 8 B. & C. 341.—See *Dwyer's Case*, *ante*, 198.

Feb. 8, 1840. In the Matter of a Presentment for payment of Officers at an ADJOURNED Assizes, in the County CAVAN.

The 110th section of the 6 & 7 W. 4, c. 116, does not authorize a presentment to the clerk of the crown or the under sheriff for duties performed at an adjourned assizes.

IN Spring, 1839, the Judges on the North-West circuit held an adjourned assizes at *Cavan*, which the clerk of the crown and the under-sheriff attended, and performed their usual services to the satisfaction of the Court. At the Summer Assizes in 1839, these officers applied to the Judges for a presentment for the duties and services performed by them at such adjourned assizes, and rested their claims on the 110th section of the Grand Jury act, 6 & 7 Wm. IV. c. 116. A doubt having been suggested on the construction of this section, *Torrens*, J., respited the presentment, in order to take the opinions of the Judges, whether those officers were entitled to any, and what pay-

ment, for the duties and services performed at such adjourned assizes.

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ELEVEN JUDGES (*Woulfe*, C. B. being absent,) were unanimously of opinion that the officers in question were not entitled to any payment for duties and services performed at an adjourned assizes(*a*).

(*a*) The only construction of the 110th section of the Act, which could authorize the officers to receive payment for services at an adjourned assizes, would be the construction that "such officer" in the latter part of the section meant an officer who had discharged his duty negligently or insufficiently.

As to presentments for duties performed at *Special Commissions*, see section 113.

In the Matter of Presentments of VAGRANTS in the Counties of MEATH and CARLOW.

Feb. 8, 1840.

AT the Summer Assizes for the Home Circuit, in 1839, two persons, both females, in the county of *Meath*, and a man in the county of *Carlow*, were presented by the Grand Jury as vagrants, in the usual manner, and in both instances the prisoners having traversed the presentments, and the cases having come on to be tried before *Bushe*, C. J., counsel (not employed by the traversers, but as *amici curiæ*) stated, that decisions had been made on this circuit by different Judges, within the last four years, some of whom held that the statutes of 6 Ann. c. 11; 9 G. II. c. 6; 11 & 12 G. III. c. 30; and 31 G. III. c. 44, (upon which the practice for many years adopted was founded,) applied only to the city and county of *Dublin*; and others, that men alone were in contemplation of the legislature, and that no woman could be legally subjected to such a proceeding. Counsel, in further support of the objection,

Held, by eleven Judges, that the Vagrant Acts (6 Ann. c. 11, 9 G. 2, c. 6, 11 & 12 G. 3, c. 30, and 31 G. 3, c. 44,) apply to the several counties in *Ireland*, and not to the county and city of *Dublin* alone. *Held* also, by six Judges to five, that those Acts apply to women as well as men.

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referred to an opinion of the late *John Mayne*, Esq., in a note in page 309 of "*Hayes's* Crimes and Punishments," ed. 1837.—"Upon the subject of these Acts a late eminent criminal lawyer, (*J. Mayne*, Esq.) writes as follows: "The usual course, but unauthorized by the Acts, is to "present the person as a vagrant, who is tried upon his "traverse as a matter of course; and then, if the traverse "be found against him, he is ordered to give security; if "found for him, he is discharged; whereas upon present-"ment alone, he is entitled to be admitted to give security. "If he traverse, and be a convicted vagrant, the judgment "shall be transportation, absolutely." No sufficiently accurate information, however, could be given, so as to enable the learned Chief Justice to ascertain with precision what course was taken by the Court in the cases alluded to by counsel, whether by quashing the presentment, or directing the jury to find against it, nor could he obtain an exact statement of the decisions relied upon, of the reasons given for them, or of the facts given in evidence. But considering it to be a question of considerable importance, his lordship thought it right, with a view to future practice, to bring it under the consideration of the Judges, in order that it might be settled.

The learned Chief Justice, in reserving the case, submitted the following observations:—"The statutes relating to these questions are the 6 Ann. c. 11, s. 1; 9 Geo. II. c. 6, ss. 1, 3, & 4; 31 Geo. III. c. 44; 11 & 12 Geo. III. c. 30. The practice which I have known to exist in such cases for the last forty years, and which I have myself been in the constant habit of adopting, is this:—When a person is presented as a vagrant, if that presentment be traversed, the practice has been to leave it to a petty jury

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to consider whether the traverser is a person of no certain place of residence, with no honest means of livelihood, who will not betake himself or herself to any honest trade or livelihood; and if so, to find for the presentment; and if not so, for the traverse; and when the verdict is against the traverse, I sentence him or her to be imprisoned for three months; at the end of which, if they cannot give security for being of the peace and good behaviour for seven years, (themselves generally in £5, and two sureties each in £2 10*s.*; and sometimes in £10, and sureties in £5,) they are to be transported for seven years."

ELEVEN JUDGES (*Woulfe*, C. B., being absent,) were unanimously of opinion that the statutes referred to were in force in the several counties in *Ireland*. SIX of them, (BUSHE, C. J., DOHERTY, C. J. C. Pleas, BURTON, J., CRAMPTON, J., RICHARDS, B., and BALL, J.,) held, that they included women as well as men; and the remaining five held, that they applied to men only; *Pennefather*, B., qualifying his opinion, by adding, "except perhaps in the county and city of *Dublin*" (*a*).

(*a*) The following statement by *Walter Bourne*, Esq. (Clerk of the Crown of the Queen's Bench) of the practice, and opinion of *Edward Tickell*, Esq. Q. C., upon the law, in cases of vagrancy, were laid before the Judges, and considered by them during the discussion:—

Statement of Walter Bourne, Esq.—"From my earliest experience on this subject, the practice has been, that upon a presentment of any person by the Grand Jury as a vagrant, a traverse was allowed to the party; and if a verdict passed in favour of the presentment, the party was sentenced to be transported for seven years, unless he or she should enter into recognizance with two sureties (from Lord *Carleton's* time, say 1789, the sums being usually £5 for the principal, and £2 10*s.* for the sureties) to be of the peace and good behaviour for seven years; and unless the security was given within a time specified (say three months) then the party was to be transported. Before Lord *Carleton's* time, the period within which security should be given was left at large, and security was taken any time before the sentence was put into execution; but from the passing of the Act

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(31 G. 3. c. 44,) about that period, a time for giving the security was always specified in the sentence or order."

Opinion of Edward Tickell, Esq. on the questions, "Whether the "Vagrant Acts now in force in Ireland, apply to the several counties in "Ireland, or to the county and county of the city of Dublin alone? and "whether women are contemplated by the statutes relating to vagrants?"— "I am clearly of opinion, that the powers given by the 6 Ann. c. 11, s. 1, to Grand Juries at the assizes to make presentments "of loose and idle vagrants," and to the justices of assize, to grant such warrants as are therein also mentioned, are not confined to the county of the city and county of Dublin, but are of general application to the several other counties in Ireland. By the 6 Ann. c. 11, s. 1, it was enacted, that such vagrants, &c. &c. should, upon the presentments of the Grand Juries at the assizes and at the general quarter sessions of the peace, and upon warrants from the justices of assize, or justices of the peace at their respective quarter sessions, be sent to gaol, &c. The 9 G. 2. c. 6, s. 1, after reciting that the several temporary laws and statutes therein mentioned (amongst which is the above statute of the 6 Ann. c. 11,) were found by experience to be of general use and fit to be continued, enacted, that the said statutes and all and every the powers, provisoes, and penalties therein contained, with the alterations and additions made in and by this (the said act of 9 G. 2,) should continue, and be in full force and effect, until, &c. By the second section of this Act of 9 G. 2, the said powers given by the 6 Ann. to the Grand Juries at the assizes and at the general quarter sessions, are both recited; but that given to the Grand Juries at the quarter sessions is stated to have been found inconvenient, and by the third section is accordingly taken away from all Grand Juries at quarter sessions with the exception of those in the county of the city and county of Dublin. As the first section contained no recital of any inconvenience arising from the power given to the juries at the assizes, so the third section leaves this latter power untouched; and as the fourth section declares the right of every person presented "at the assizes" to traverse, it proves beyond a doubt that the legislature did not intend by any thing in this last-mentioned act, to take away the said power of presentment so given as aforesaid to Grand Juries at the assizes. As however the said act of 9 Geo. 2, sec. 2, recited that there were great numbers of loose and idle vagrants in the county of the city and county of Dublin, powers of presentment of such persons were thereby also given to the Grand Juries at the King's bench sessions of oyer and terminer and gaol delivery, held in the King's courts after term, for the county and county of the city of Dublin, and by the third section, the powers which had been previously possessed by the Grand Juries were given or preserved to the Grand Juries at the quarter sessions of those two last-mentioned counties. That the act of the 11 and 12 Geo. 3, c. 30, which was passed for the relief of the impotent poor, and the restraint of vagrants, did not operate as an actual or implied repeal of the 6 Ann., is manifest, from this latter statute having been so far as relates to the presentment of loose and idle vagrants revived after it had expired, and made perpetual by the 31 Geo. 3, c. 44; and it may be further observed, that if the 9 Geo. 2 had operated to repeal the powers given by the 6 Ann. to *Grand Juries* at the assizes, (as it clearly did with respect to the powers of Grand Juries at the quarter sessions,) no part of the 6 Ann. relating to the presentment of

vagrants would have been revived and made perpetual as before mentioned by the said act of the 31 Geo. 3.

" On the next question, ' whether *females* are subject to the provisions of the 6 Ann.'; I am of opinion that they are, and should be equally clear on this point as on the former, were it not for the decision of Mr. Baron *Foster*, in the *Queen* v. *Adams*, as reported in 1 Cr. & Dix's Circuit cases, 140. The following are the classes of persons described in the statute. 'All loose and idle vagrants and such as pretend to be Irish gentlemen, and will not betake themselves to any honest livelihood, but wander about demanding victuals and cosbering from house to house, and also all loose and idle persons of infamous lives and characters.' The statute of 9 Geo. II. by its second section recites, that by virtue of the above statute of the 6 Ann. upon presentment of the Grand Juries at the Assizes, &c. 'of any loose or idle vagrants or such as would not work or betake themselves to an honest livelihood, or of loose persons of infamous lives and characters," such persons were to be sent to gaol, &c., and it (the 9 Geo. 2.) then proceeds to give to the Grand Juries at the King's Bench, &c. powers to present precisely the same description of persons, namely, 'All loose and idle vagrants and such as would not work and betake themselves to an honest livelihood, and all loose persons of infamous lives and characters.' Now, if under these latter words so contained in the 9 Geo. 2, females might be presented by the Grand Juries at the King's Bench, &c. in the county of the city and county of Dublin, there can be no reason why they might not be equally presented at the Assizes under the 6 Ann. the Grand Juries there having, according to the above recital, powers to present the same classes of persons as are mentioned in the 9 G. 2; and that females were contemplated by the legislature as falling under the operation of both statutes, is, I think, manifest from the terms of the 4th section of the 9 Geo. 2. This clause begins by reciting that a doubt had been conceived whether persons so presented by any Grand Jury, (presentments by Grand Juries at the Assizes had been previously mentioned in the second section of said Act,) had a right to traverse. It then enacts and declares that it shall be lawful for every person or persons so presented by any Grand Jury at the King's Bench Assizes, &c. to traverse such presentment, if he, she, or they shall think fit, and by the latter part of the same section it provides, that if such traverse should be found against him, her, or them, then such person shall be sent on board the fleet, or be transported, &c. It was argued in a case reported in a note to the before-mentioned case of the *Queen* v. *Adams*, that the 6 Ann. refers alone to loose and idle vagrants, pretending to be Irish *gentlemen*; but this is not so, it goes much further; it embraces, according to the 9 Geo. II. all loose and idle vagrants, and all loose persons of infamous lives and characters; and by the 31 Geo. 3, the statute of Anne was, so far as it regarded the presentment of loose and idle vagrants, with the alterations and additions made by the 9 Geo. 2, revived and made perpetual. These two statutes, therefore, so far as regards the presentment of vagrants, ought now to be looked upon as one, and it is impossible, in my opinion, to apply a rule of construction to the one, which ought not to be equally applied to the other. Both were directed principally against vagabonds, and that such persons were liable to be transported under the 6 Ann. appears from the provision in the latter end of the 2d sec. of 9 Geo. 2, subjecting those who were presented by Grand Juries in the

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county and city of *Dublin*, and who broke gaol, &c., to the same presentment as vagabonds ordered to be transported at the assizes. It is also argued in the before mentioned note, that the punishment of being sent on board the Fleet is not applicable to females, and that therefore the statute of 6 Ann. ought not to be extended to them; but the same objection would apply to extending to them the 9 Geo. 2, in which the presentments are exactly the same as those in the 6 Ann., viz: being sent on board the Fleet, or transportation. In the same note it is also argued that because the statute of 11 and 12 Geo. 3, c. 30, contained enactments against strolling prostitutes, and provided specific penalties for them, therefore such persons are not subject to those penalties contained in the 6 Ann. The clause alluded to in the 11 and 12 Geo. 3, is the 8th section, which enacts, that the corporations therein mentioned might and were thereby required, as soon as they should have funds for building and furnishing houses of industry, to take into those houses so many vagrants, sturdy beggars, and vagabonds, to be kept at hard labour, and so many helpless poor, as their funds would admit of: and the said corporations were authorized and required to seize every strolling vagrant capable of labour, who had no place of abode, and who did not live by his or her labour or industry, and every person above the age of fifteen, begging without a licence, and every strolling prostitute capable of labour, and to commit, &c. Now, if vagrant prostitutes, because they are included in this act, were to be exempted from the operation of the 6 Ann. and of the 9 Geo. 2, so equally ought every male strolling vagrant capable of labour, who had no place of abode, and who did not live by industry; but such effect has never been given to the 11 and 12 Geo. 3, an Act which in truth has remained a dead letter since it was passed. Confusion has been occasioned by considering the 6 Ann. so far as it relates to the presentment of vagrants, as one of a set of Acts commencing with the 6 & 9 of Wm. 3, for suppressing robberies, burglaries, burning of houses or haggards, and killing or maiming cattle, and for giving satisfaction against the barony to those who should suffer from such occurrences. The burning or malicious injury acts have always been considered as forming a code of laws totally distinct from, and independent of, those laws and enactments which apply to vagrants. On the whole, therefore, I am of opinion, that as a woman may be a vagabond, and may fall under the description of a loose and idle vagrant of infamous life and character, she is within the operation of the 6 Ann.; and I do not think that her being a prostitute gives her any privilege or exemption which any other loose and idle female vagrant does not possess.

E. TICKELL."

As to the acts relating to cases of vagrancy, which are *not* the subject of presentment, see *M'Clusky's* case, ante 162, 163, note.

In the Matter of an Application for a PRESENTMENT for a BRIDGE, County of Westmeath.

Feb. 8, 1840.

At the close of the business of the Crown court, at the Summer Assizes for the county of *Westmeath*, in 1839, held before *Bushe*, C. J., counsel on behalf of *Richard Tilson* and *Simon Griffith* moved upon the following memorial:—"To the Right Hon. and Hon. Judges of Assize "for, &c. The humble memorial of *Richard Tilson* and "*Simon Griffith*, of, &c., Sheweth, that your memorialists "being persons paying grand jury cess in and for the "county of *Westmeath*, at and long before the time of "making the applications herein-after mentioned respec- "tively, your memorialists caused such notices and "copies of notices to be duly served and posted at the "times and in the manner by law in that behalf required, "for the purpose of having the first application hereinafter "mentioned laid before the justices and the cess-payers asso- "ciated with them in the business of a presentment sessions "holden in *Castlepollard*, in the barony of *Demifore*, and "county aforesaid, on the 9th day of January, in the year "of our Lord 1839. And your memorialists further show, "that having, at the time and in the manner by law re- "quired, lodged with the secretary of the Grand Jury for "the county aforesaid, a map of the proposed bridge "herein-after mentioned, and also an application in writing "signed with the proper hands of your memorialists in the "words and figures following: 'County of *Westmeath;* "'We *Richard Tilson* and *Simon Griffith*, both of, &c., "'do certify that we have lately viewed or examined the "'*Island Ford*, on the river *Inny*, between the townlands

Where an application for a public work had been brought forward at presentment sessions by two cess payers, and being rejected there, was brought before the Judge of Assize, under the 6 & 7 W. 4, c. 116, s. 18: *Held*, first, that the Judge was not at liberty to direct the Grand Jury to make such a presentment, without causing a petit Jury to be impanneled; secondly, that the Judge was bound to cause a petit Jury to be impanneled upon a proper memorial being preferred, and the requisites under the statute performed; and thirdly, that the Judge had, after a verdict for the applicant, a discretion to direct the GrandJury to consider the case or not.

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" ' of *Scrubbywood* or the islands in the barony of *Demifore*,
" ' and *Clondee*, in the barony of *Moygoish*, and that it will
" ' be useful to build a bridge at said place in this county,
" ' on a proposed new line of road from *Castlepollard* to
" ' *Edgeworthtown;* and we propose that the expense of
" ' the aforesaid work shall not exceed £813, and shall be
" ' defrayed by the baronies of *Demifore* and *Moygoish*, and
" ' that presentment for such purpose may be made under
" ' and by virtue of the 56th section of the 6 & 7 Wm. IV.
" ' c. 116, being an act to consolidate and amend the laws
" ' relating to the presentment of public money by Grand
" ' Juries in *Ireland.*' And which application was in all
" respects accurate and true. That said application was
" laid before the said justices and cess-payers, at the said
" sessions, who took the same into consideration, and having
" examined into the merits of the said application, and of
" its conformity with the provisions of the statute in such
" case made and provided, the said justices and cess-
" payers decided by a majority of voices that the said ap-
" plication ought to be rejected. And your memorialists
" further show, that having in like manner again caused
" such notices and copies of notices to be served and
" posted as by law required, for having a similar application
" in all respects laid before the justices and cess-payers as-
" sociated with them in the business of the next present-
" ment sessions, holden at *Castlepollard*, for the barony
" aforesaid, in the county aforesaid, and having again
" lodged with the Secretary of the Grand Jury such a map
" of the proposed bridge as aforesaid, and an application
" precisely similar to the former; such last-mentioned ap-
" plication was regularly laid before the justices and cess-
" payers associated as aforesaid at such next presentment
" sessions, holden at *Castlepollard* aforesaid, on the 22d day

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" of May last, who then took the same into their consider-
" ation, and having examined into the merits of the said
" last-mentioned application, and of its conformity with
" the statutes in such case made and provided, the said
" justices and cess-payers decided by a majority of voices
" that the said application ought to be rejected. And your
" memorialists further show that the magistrates and cess-
" payers having at said two successive presenting sessions
" refused to approve of such applications made for such
" public work as aforesaid, which memorialists show was
" a proper work to be executed; your memorialists, pur-
" suant to the provisions of the 18th section of 6 & 7 Wm.
" IV. c. 116, entitled, &c., pray that your lordships the
" Judges of assize may be pleased to direct the Grand Jury
" of the said county to make a presentment for the work
" for which your memorialists made such application as
" aforesaid, and that your lordships may make such further
" or other orders, and take such further or other proceed-
" ings in the premises, according to the statutes in such
" case made and provided, as to your lordships shall seem
" fit.—Dated this 4th day of June, 1839.

" RICHARD TILSON,
" SIMON GRIFFITH."

This application was opposed by counsel, who admitted that the memorialists had performed all the preliminary requisites prescribed by the statute, and that the memorial correctly stated the proceedings at sessions therein mentioned. No evidence was given at either side. The following questions were raised upon the argument:—first, whether the Judge was at liberty to direct the Grand Jury to make such a presentment without causing a petit jury to be impanneled? Secondly—Whether merely upon

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the party preferring a proper memorial, and duly performing the requisites under the statute, the Judge is bound to cause a petit jury to be impanneled? Thirdly—Whether, if a petit jury duly impanneled shall find a verdict for the memorialist, the Judge is bound to desire the Grand Jury to consider the presentment, or whether he may, notwithstanding such finding, refuse to do so?

The learned Chief Justice, with the consent of the parties, respited the presentment to the next assizes, (without prejudice to the memorialists from the delay,) in order to submit these questions to the consideration of the Judges.

ELEVEN JUDGES, (*Woulfe*, C. B., being absent,) unanimously agreed upon the following answers to the questions proposed:—first, that the Judge is not at liberty to direct the Grand Jury to make such a presentment as that required, without causing a petit jury to be impanneled. Secondly, that the Judge is bound to cause a petit jury to be impanneled. Thirdly, that the Judge has, after a verdict for the applicant, a discretion to direct the Grand Jury to consider the case, or not so to direct them, as he may think proper.

THE QUEEN *v.* BRIDGET KELLY. *June* 18, 1840.

An indictment against a woman for the murder of her child, not stating that the child was born alive, but stating that it was exposed by the prisoner, and in consequence "languished, and languishing did live for half an hour, and then died," and "that so the prisoner did kill and murder the child in manner aforesaid," is good.

Semble, that an indictment for the murder of a "certain male child," without further description, is insufficient.

THE prisoner was convicted before *Greene*, Serjeant, at the Spring Assizes for *Roscommon*, in 1840, upon the following indictment:—First count. "County *Roscommon* to wit: "The jurors for our sovereign lady the Queen upon their "oath do say and present that *Bridget Kelly*, late of, &c., "heretofore to wit, on the 11th day of November, 3 Vict., "at, &c., was delivered of a certain male child—and the "jurors aforesaid, upon their oath aforesaid, do further "say and present, that the said *Bridget Kelly*, afterwards, "to wit, on the said 11th day of November, in the said "third year of the reign of our said lady the Queen, had "in her care, custody, and control, the said male child, "he, the said male child, then and there being of tender "age, to wit, the age of one day, and by reason of such "tender age, being utterly incapable of making known his "natural wants, or of providing for, or procuring his natural "attention, support, and maintenance; and the jurors, &c., "do further say and present, that the said *Bridget Kelly*, "well knowing the premises, and not having the fear of "God before her eyes, but being moved and seduced by "the instigation of the devil, and of her malice aforethought "contriving and intending to kill and murder the said "male child of such tender age as aforesaid, to wit, on the "said 11th day of November, in the said third year, &c., "with force and arms, at, &c., in and upon the said male "child feloniously, wilfully, and of malice aforethought, "did make an assault, and did then and there of her "malice aforethought, contriving and intending to kill and "murder the said male child, place, put, leave, desert, and

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" abandon the said male child in a certain stone wall, " situate at *Morganstown* aforesaid, in the County of *Ros-* " *common* aforesaid, in a state wholly destitute and unpro- " tected; the said male child then and there being by " reason of his tender age utterly incapable of making " known his natural wants, or of providing and procuring " for him necessary attention, support, and maintenance; " and the jurors, &c., do further say and present that by " reason of such placing, putting, leaving, deserting, and " abandoning the said male child in the said stone wall, at " *Morganstown* aforesaid, in the County aforesaid, he the " said male child, for want of needful food and sustenance, " and of due and proper care and attention, and by and " through the inclemency of the weather, there and then " instantly languished, and languishing did live for and " during the time and space of half an hour, and then and " there the said male child in manner and by means afore- " said, perished and was deprived of life; and so the jurors, " &c., do say and present that the said *Bridget Kelly* the " said male child, with force and arms aforesaid, in manner " and form aforesaid, feloniously, wilfully, and of her " malice aforethought, did kill and murder," against the peace and statute. Second count:—"And the jurors, &c., " do further say and present, that the said *Bridget Kelly*, on " &c., with force and arms, at &c., not having the fear of " God before her eyes, &c., in and upon a certain male " child, feloniously, wilfully, and of her malice aforethought, " did make an assault, and that the said *Bridget Kelly*, with " a certain stone of no value, which she the said *Bridget* " *Kelly* in her right hand then and there had and held, the " said male child in and upon the head of him the said " male child then and there feloniously, wilfully, and of " her malice aforethought, did strike and wound, thereby

"giving to the said male child then and there with the "stone aforesaid, in and upon the head aforesaid of him the "said male child, one mortal wound of the length of two "inches and of the depth of two inches, of which said "mortal wound the said male child then and there instantly "languished, and languishing did live for the time and "space of half an hour, and then of the said mortal wound, "at, &c., died; and so the jurors aforesaid, upon their oath "aforesaid, do say, that the said *Bridget Kelly* him the "male child in manner and form and by means aforesaid, "feloniously, wilfully, and of her malice aforethought did "kill and murder," against the peace and statute.

Casserly an *M'Causland*, for the prisoner, moved that the judgment should be arrested, on the ground of the insufficiency of the indictment; the first count being defective in not averring that the child was born alive, and the second in not properly describing the male child therein mentioned, either by name, or age, or otherwise, or saying that it was to the jurors unknown; and in being too general. It was contended on behalf of the crown, that the conclusion of the first count supplied the want of an averment that the child was born alive; and that no more particular description was necessary in the second count. In support of the first objection were cited the precedents in *Archbold's* Crim. Plead., where the form of indictment avers that the child was born alive; and in support of the second, *Biss's* case, 8 Car. & Payne 773, and *Evans's* case, *ibid.* 765(*a*). The opinion of the learned Judge was that the second count was bad, but that the first was good; and he re-

(*a*) See also the cases collected in Arch. Plead. & Ev., 30, (8th ed.) which appear to leave no doubt upon the subject.

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served for the consideration of the Judges the question whether either of the counts could be supported.

ELEVEN JUDGES (*Woulfe*, C. B., being absent) were unanimous in upholding the conviction, on the ground that the first count was good. *Richards*, B., held the second count to be bad, but the other Judges gave no opinion upon that point.

May 18, 1840.

The QUEEN *v.* JAMES HARTNETT and THOMAS CASEY.

Where the Judge omitted, in pronouncing sentence on a conviction for murder, to order that the bodies of the prisoners should be buried within the precincts of the gaol, as directed by the 4 & 5 W. 4, c. 26, s. 2; but on a subsequent day, on ruling the book at the close of the same assizes, in the absence of the prisoners, ordered the clause in question to be inserted; *Held*, that the sentence was illegal, notwithstanding the 6 & 7 W. 4, c. 30, s. 2.

THE following report was submitted by *Richard Moore*, Q. C., to *Bushe*, C. J., to be laid before the Twelve Judges for their consideration :—

" At the last assizes held for the city of *Cork*," (Spring Assizes, 1840) " *James Hartnett* and *Thomas Casey* were " convicted before me of murder. After conviction they " were asked, in the usual way, whether they had any " thing to say, why sentence of death should not be pro- " nounced upon them; and I then pronounced sentence of " death, but did not at that time direct that their bodies " should be buried within the precincts of the gaol. When " ruling the book in a day or two after, I directed in open " Court that their bodies should be buried within the " precincts of the gaol. The prisoners were not in Court " on this latter occasion.

" It has been suggested by Mr. *Coppinger*, one of the " counsel for the prisoners, that the above proceeding is

" open to objection, and that the prisoners are entitled " to derive some benefit from the objection. I have not " been apprized of the ground of the objection, nor " whether the counsel contends that there is error in the " proceeding. On communicating with the Attorney-" General, he has suggested that I ought to lay the facts " before your lordship, in order to have your opinion, and " that of the other Judges: and for that purpose I have " taken the liberty of making the above statement to your " lordship.

" I have the honor to be,

" My Lord,

" Your obedient servant,

" RICHARD MOORE."

The following certificate, signed by the prisoners' counsel, was also laid before the Judges:—

" We certify, that the prisoners, *Hartnett* and *Casey*, " were tried before *Richard Moore*, Esq. one of her Ma-" jesty's Judges of Assize for the Munster Circuit, at the " last assizes for the county of the city of *Cork*, charged " with the wilful murder of *Patrick Lawlor*, and that both " of said prisoners, *Hartnett* and *Casey*, were found guilty " of that wilful murder. We further certify, that the " learned Judge, in passing sentence of death upon each of " these two persons, omitted to pronounce the sentence as " directed and prescribed by law, namely, that he omitted, " in pronouncing said sentence upon said *Hartnett* and *Casey*, " to express that the bodies of the said prisoners should be " buried within the precincts of the prison, as is directed " and prescribed by the Act of Parliament(*a*), in that case

(*a*) 4 & 5 W. 4, c. 26, s. 2.—See also the 6 & 7 W. 4, c. 30, s. 2, and the 1 Vict. c. 77. The title, and the 3d section, of the latter Act, were referred to by the Attorney-General, after the argument, as possibly bearing upon the question.

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"made and provided. And we further certify, that "the said prisoners were not, nor was either of them, "again, during said assizes, called up before said Judge, "nor did he pronounce upon them, in their presence, "any sentence pursuant to law; and we certify, that in "our opinion there are reasonable grounds to argue, that "the above judgment should be reversed upon error "brought.

"CHRISTOPHER COPPINGER,
"WM. DEANE FREEMAN."

The case was argued by the Attorney-General and other counsel for the Crown, and also by counsel for the prisoners, before ten of the Judges (*Woulfe*, C. B., and *Pennefather*, B., being absent); and the majority of them, consisting of SIX JUDGES (DOHERTY, C. J., TORRENS, J., FOSTER, B., CRAMPTON, J., PERRIN, J., and BALL, J.,) were of opinion, that the sentence was illegal. All those Judges, except *Perrin*, J., rested their opinion upon the ground, that the original sentence, of death only, was illegal, because it did not contain an order that the bodies should be buried within the precincts of the gaol; that the 4 & 5 W. IV. c. 26, s. 2, was not merely directory, but made the order a part of the sentence; and that the amendment would have made it right, if made in the presence of the prisoners, but that as it was made in their absence, they were not affected by it. *Perrin*, J., held, that the sentence of death alone was, by force of the 6 & 7 W. 4, c. 30, s. 2, the only legal sentence which could have been passed since that statute; but that what was added in the Crown-Book had rendered it illegal, because if a record had been made of the conviction from the Crown-Book, it would not appear from it to have been entered in the absence of the prisoners. The minority

(consisting of BUSHE, C. J., JOHNSON, J., BURTON, J., and RICHARDS, B.,) held the sentence to be legal. Of these, BUSHE, C. J., was of opinion, that the original sentence would have been illegal, if the case had occurred before the 6 & 7 W. IV. c. 30, s. 2, the order to bury being essential to the legality of the sentence; but that statute having put sentences for murder upon the same footing as sentences for any other capital offence, the sentence pronounced in the presence of the prisoners was, as such, a legal sentence; and that what was done in the absence of the prisoners could not have the effect of making that illegal, which was legal before. The other three members of the minority were of opinion, that the original sentence was legal, and would have been so before the 6 & 7 W. IV. c. 30, the clause respecting the order to bury the body being only directory, and not making such order indispensable to the legality of the sentence; and that the amendment in the absence of the prisoners did not render it illegal.

The decision being favourable to the prisoners, they were accordingly pardoned and discharged; but with the view of establishing uniformity and certainty with respect to statutable provisions which are common to both countries, *Bushe*, C. J., wrote to the Lord Chief Justice of England, to inquire whether, in *England*, since the late alterations in the criminal law, any question had been raised, or any decision made, as to what was the legal sentence to be passed upon persons found guilty of murder. His Lordship, at the same time, transmitted a statement of the above case, and of the decision of the Judges upon it. The answer of the Lord Chief Justice of *England* was as follows:—

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" *Westminster-hall*, June 8, 1840.

" My dear Lord,

" Though no case has come regularly before the " Judges of *England* on the point stated by your Lord- " ship, I have no doubt that they would come to the " same decision as that which has taken place at *Dublin*. " I myself, two years ago, passed a sentence with the same " defect, and found so strong a doubt of its legality pre- " vailing among the Judges, that it seemed prudent to " recommend a commutation of the sentence. Certainly " in this country no sentence for murder will omit here- " after to include direct on for burying the convict's " body.

" Your Lordship's

" Most faithful servant,

" DENMAN."

" To the Lord Chief Justice
" of *Ireland*.

IN the Matter of a Presentment for the Repairs of ROADS in the County of TIPPERARY.

June 18, 1840.

Held, that in consequence of the 6 & 7 W. 4, c. 116, the Grand Jury had no power to make a presentment for the expenses of repairing a turnpike road in *Tipperary*, under the 3 & 4 W. 4, c. 112, s. 92, where the application for that purpose had been disallowed at the sessions.

HENRY *Pedder* and *Thomas Hughes*, two of the Trustees of the *Clonmel* turnpike district, applied, on behalf of that district, under the 3 & 4 W. IV. c. 112, (local and public) to the Road Sessions held at *Clonmel* for the County of *Tipperary* at large previous to the Spring Assizes, 1840, for a presentment for £300, for repairing part of the road from *Kilkenny* to *Clonmel*, to be levied off the south riding of the county; but the application was disallowed at sessions. A copy of this application was, however, afterwards laid before the Grand Jury for the South Riding of the county at *Clonmel* Spring Assizes, 1840, and a presentment was thereupon passed for the required sum by the Grand Jury. The application and presentment were as follows:—

" We, *Henry Pedder* and *Thomas Hughes*, both of, &c., " do certify, that we have lately viewed and caused to be " measured 11,735 perches of the turnpike road leading " through *Clonmel*, from the city of *Kilkenny* to the city " of *Cork*, &c., and that the said 11,735 perches of land " are in the townlands following, viz. &c., all in this " county, and that the same are in need of repair; and " we propose that the expense of the aforesaid repairs " shall not exceed £300, at the rate of 6*d.* per perch, " and shall be defrayed by the South Riding of the " county at large, and that a presentment for such pur- " pose shall be made under and by virtue of the 12th " section of the 6 & 7 W. IV. c. 116, being an Act " to consolidate the laws relating to, &c., and under

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" and by virtue of the 92nd section of the 3 & 4 W. IV. " c. 112, being an Act for more effectually repairing " several roads in the counties of *Carlow*, *Kilkenny*, and " *Tipperary*, and also the road from the town of *Clonmel*, " through the county of *Waterford*, to the cross roads of " *Knocklofty*, in the said county of *Tipperary*.

" HENRY PEDDER.

" THOMAS HUGHES."

" We present the sum of £300, to be levied and raised " on the South Riding at large, and by the Treasurer paid " over to *Henry Pedder* and *Thomas Hughes*, for repairing " 11,735 perches of the turnpike road leading through " *Clonmel*, from the city of *Kilkenny* to the city of *Cork*, " between *Nine-mile-house* and *Glanduff-bridge*.—3 & 4 " W. IV. c. 112, s. 92. Ordered for self and fellow- " jurors,

" J. BAGWELL, Foreman."

The 92nd section of 3 & 4 W. IV. c. 112, was as follows :— " And be it further enacted, that nothing in this Act " contained shall extend, or be construed to extend, to " take away from Grand Juries the power or the obliga- " tion to repair any part of the roads to which this Act is " specifically applicable, but that it may be lawful for the " Grand Juries of the counties of *Carlow*, *Kilkenny*, *Tip-* " *perary* and *Waterford*, and they are hereby required to " present, from time to time, such sums, to be levied on " the counties at large, as shall appear to be necessary, in " consequence of the deficiency of the tolls, for repairing " any part of the said roads, or for making or repairing " the bridges, quay walls, pipes, and gutters, thereon, or " the footpath thereto, and also for repairing such parts

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" of the old road, as now are or shall be used as a public " road, although a turnpike or turnpikes may be erected " thereon, provided it shall appear that the receipts of " such turnpikes are not sufficient for defraying the " expenses of such repairs, such presentment and pre- " sentments to be made on the like applications, and " subject to the like inquiries and forms for accounting as " are ordained and required by the Acts(*a*) now in force " for the making and repairing of roads."

It was insisted before *Richards*, B., the Judge of Assize, that the presentment in question was to be considered as imperative, under the 3 & 4 W. IV. c. 112, s. 92, or at all events that it was such a one as the learned Judge might legally fiat. His lordship, however, entertained considerable doubt as to the power of the Grand Jury to make the presentment, and therefore respited the fiating of it, in order to obtain the opinion of the Judges. The three objections which suggested themselves were as follows:— First, that a particular mode of proceeding, and a distinct and ample remedy, were given by ss. 61 and 65 of the 6 & 7 W. IV. c. 116: Secondly, that that Act was a repeal of s. 92 of the 3 & 4 W. IV. c. 112: and thirdly, that even supposing it not to repeal that section, yet the Grand Jury had no power to pass the presentment, if thrown out or disapproved of at the presenting sessions.

ELEVEN JUDGES (*Woulfe*, C. B., being absent) unanimously held, that the presentment should not be fiated.

(*a*) The principal Act then in force on the subject, was the 59 G. 3, c. 84.

June 19, 1840.

IN the Matter of Presentments for the NORTH RIDING of the County TIPPERARY.

Where, after the division of a county into two ridings by proclamation under the 6 & 7 W. 4. c. 116, s. 176, presentments for the north riding, founded on contracts entered into after the division, were by mistake passed at the assizes for the south riding: *Held*, that the Judge of assize had no power to rectify the mistake by ordering the presentments to be levied on the north riding.

By a proclamation of the Lord Lieutenant and Council of Ireland, dated the 8th of November, 1838, and made in pursuance of the 6 & 7 W. IV. c. 116, s. 176, it was amongst other things directed, that thenceforth the county of *Tipperary* should be divided into two ridings, one to be called the South Riding, and the other the North Riding, and that the town of *Clonmel* should be the assize town for the South Riding, and the town of Nenagh the assize town for the North; and it was also ordered, that no presentment should thenceforth be made by the Grand Jury at *Clonmel* or *Nenagh*, of any sum of money to be levied off the said county of *Tipperary* at large, nor should any presentment be made by the Grand Jury of *Clonmel* of any sum of money to be levied off any barony, or half barony, or denomination in the North Riding, except in the cases therein after provided; or by the Grand Jury at *Nenagh* of any sum to be levied off any barony, or half barony, or denomination in the South Riding; but that each of the said Grand Juries respectively should have power to present any sum, to be levied off the whole of the riding, in and for which such Grand Jury should act, as if each such riding were in itself a county at large. It was further ordered, that this proclamation should commence and take effect from the 10th day of December then next (1838); provided always, that all Presentment Sessions ordered, and all presentments and contracts made, or money to be levied, accounted for, or paid in the said county, under, or in consequence of any Act or Acts in force, before the

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said 10th day of December, should be proceeded on, levied, and accounted for, and paid, in the manner provided for by those Acts, and subject to the rules, regulations, and provisions, contained in them, as if such proclamation and division of the county had not been made.

Previously to the division of the county, the Secretary of the Grand Jury was in the habit of annually bringing on the contracts, which had before been entered into for periods of years, and which were always passed by the Grand Jury, and fiated by the Judge as of course; and at the two assizes which intervened between the division of the county and the Spring Assizes of 1840, the Grand Jury at *Clonmel*, in pursuance of the provisions of the proclamation, passed the annual presentments for such contracts as usual, as well those which related to roads in the North, as in the South Riding. But at the Spring Assizes of *Clonmel* in 1840, (being the first assizes at which it became necessary to bring on such contracts as had been entered into subsequent to the division of the county) not only those which had been entered into previous to the division, but also those contracts which had been made at the Spring Assizes in 1839, as well for the North, as for the South Riding, were all brought on, and passed by the Grand Jury for the South Riding at *Clonmel*. This circumstance did not come under the notice of *Richards*, B. (the Judge of Assize), or of the Clerk of the Crown, until after the assizes of *Nenagh*, when the latter came in the usual way to make copies of the presentment books for the Treasurer; and as it appeared to him that the Grand Jury of one riding had no control whatsoever over any presentment originally passed by the Grand Jury of the other, he thought it his

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duty to bring the matter before the Judge, as he did not conceive that under the provisions of the proclamation he would be justified in having those presentments put on the levy with the others. The presentments in question were all founded on contracts for repairing roads for different terms of years, and if laid before the Grand Jury at *Nenagh*, they would have been passed without doubt, as of course. The mistake, however, of the Secretary of the Grand Jury was in bringing them before the Grand Jury at *Clonmel*, as if they had been contracts entered into before the division of the county.

Richards, B., accordingly reserved for the opinion of the Judges the question: Could the Judge authorise the Clerk of the Crown to put these presentments, so founded on contracts entered into subsequent to the division of the county, on the levy for the North Riding; they having already been fiated by the Judge, under the circumstances above stated, at *Clonmel*, the assize town for the South Riding?

TEN JUDGES (*Doherty*, C.J. C. Pleas, and *Woulfe*, C.B., being absent) unanimously decided, that the Judge of assize had no power to set the mistake right.

The ATTORNEY-GENERAL Apppellant; WILSON, Respondent. *June* 18, 1840.

The Attorney-General is not liable to deposit or give security for costs under the 6 & 7 W 4, c. 75, s. 31, upon appealing from a dismiss of a civil bill brought by him against a Bridge Contractor on his recognizance under the 6 & 7 W. 4, c. 116, s. 168.

On the hearing of such a civil bill it lies on the defendant to prove that the Bridge was built, and not on the Attorney-General to prove that it was not.

Semble, that the amount of the sum to be decreed in such a case is to be measured by the amount of actual damage sustained.

At the sessions preceding the Spring Assizes for the county of *Fermanagh*, in 1840, the Attorney-General had proceeded by civil bills against several contractors for public works and their sureties, suing them on their recognizances under the 6 & 7 W. IV. c. 116, s. 168(*a*). The assistant barrister in all these cases had dismissed without prejudice and without costs. The Attorney-General appealed, and on the hearing of these appeals before *Foster*, B., at the ensuing Assizes, some questions arose which he reserved for the opinion of the Judges. Amongst these were the following:—

In the case of the *Attorney-General* v. *Wilson* (one of the civil bill cases in question) it was contended, that the Attorney-General was not at liberty to appeal, not having entered into any recognizance, nor deposited with the Clerk of the Peace double the costs of the dismiss, under the 6 & 7 W. IV. c. 75, s. 31, and 6 & 7 W. IV. c. 116, s. 168. The first question therefore was, whether the Attorney-General, so suing, is bound to the observance of those preliminaries?

In the same case, the work contracted for being the building of a bridge, the second question was, whether the *onus* of proving that the bridge had not been built was cast on the Attorney-General, or the *onus* of proving that it had been built, was cast upon the person sued?

(*a*) Vide sched. Y of that Act, for the form of the recognizance.

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The bridge, in point of fact, not having been built, the third question was, for what sum the Court should make its decree; whether for £72, which was the amount of the recognizance, or for £36, which was the amount of the presentment, or for some smaller sum? And in the latter case, by what principle the amount was to be ascertained?

In the same case it appeared, that the bridge was to have been built over a stream in a bog, through which a new line of road was to be made. The contract for the making of that new line had been obtained, not by *Wilson* (the defendant), but by another person, who had not made the road, nor attempted to make it; and until that road should be made, it was nearly impossible that the materials for building the bridge could be brought to the place in question; in the mean time, the last day for building the bridge had passed. The fourth question was, what ought to be the decree of the Court, in reference to this latter circumstance?

ELEVEN JUDGES having met (*Woulfe*, C. B., being absent), the first question was decided by a large majority, and the second question unanimously, in favour of the Attorney-General; the decision being that he was not liable to pay costs, or to give security by recognizance, in the case proposed, and that the *onus* of proving that the bridge had been built lay upon the defendant. On the other questions, there was no decision of the Judges, but from what appeared to be their general opinion, upon the discussion which took place on those points, *Foster*, B., considered that he should be enabled to dispose of the

remaining questions without requiring the Judges to give their opinions *seriatim*(*a*).

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(*a*) See this case (*Attorney-General* v. *Wilson*) in the court below, reported in 1 Cr. and Dix's Circuit Cases, 447. From the conclusion of that report (p. 452) it appears that the learned Baron considered the third question (as stated in the text), to have been viewed by the Judges agreeably to his own opinion, viz:—that the decree should be for the amount of damage actually sustained. No mention is made of the point arising on the 4th question.

THE QUEEN *v.* PATRICK MURPHY.

June 19, 1840.

The prisoner was indicted for soliciting J. B. to murder C.M. The evidence was, that the prisoner procured salt petre and gave it to J. B. to be administered to C.M. and that J. B. administered it accordingly, and that C.M. detected the poison in time to save her life after having swallowed some of it. The Jury found the prisoner guilty; and stated their opinion to be, that the solicitation was to administer salt petre with intent to poison, and that the salt petre had been attempted to be administered. *Held*, that the conviction was good, the prisoner having been rightly indicted, as a principal, for soliciting to murder, instead of as an accessary before the fact to the administering poison with intent to murder; and the 10 Geo. 4, c. 34, s. 9, not having been repealed by the 1 Vict. c. 85, s. 3.

AT the Spring Assizes for *Cork*, in 1840, *Patrick Murphy* was tried before *Perrin*, J., on an indictment which charged that he on the 6th of February, 3rd Vict., at *Carrigshane*, did feloniously propose to, solicit, encourage, and endeavour to persuade one *James Barrett*, feloniously, and of his malice prepense, to kill and murder *Catherine Murphy*, against the peace and statutes.

The first witness was *James Barrett*, who swore that he was arrested for giving the prisoner's wife something. The prisoner was thatching for witness; he talked of poisoning—if he could get his wife poisoned. On another day he said, "I have a very bad wife, and a very disagree-"able one; and if you could give her a dose of salt petre,

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" as I attempted;—the reason why, I have another in view; " you'll come on Sunday morning, I'll get the salt petre " at Mrs. *Rees's*." The witness said he would, and on Sunday the prisoner took witness to Mrs. *Rees's* (a shopkeeper), and gave him a pint of porter, and a penny to buy salt petre, which the witness got; the prisoner desired the witness to go and call on *Catherine Murphy*, and bring her down to a public house, kept by a Mrs. *Blacket*, and to get two pints of porter, and sweeten one of them well for her, that she might not taste the salt petre: witness went accordingly and brought her down, and ordered the porter to be well mulled and sweetened. The prisoner then advised witness to take *Catherine Murphy* into the far room, then to send her out for a penny bun, and when she went out, to put the salt petre in her pint; which witness did. When she came in she tasted the porter, and drank half of it; she perceived the taste, and took it to Mrs. *Blacket*, who said it had the taste of soot; Mr. *Mansfield*, an apothecary, said the same, but he examined it, and found the salt petre. Witness was accordingly arrested, and he informed against the prisoner.

The second witness, *Edward Rees*, stated, that he saw the prisoner and *Barrett* together, and *Barrett* asked for one penny worth of salt petre: witness gave him two ounces, which he gave prisoner.

Michael Collins proved that he gave *Barrett* money; saw him and the prisoner together; the prisoner said to witness, that *Barrett* was annoying him for six-pence. Witness said, he would give it, and did so.

Mary Murphy proved, that she saw *Barrett* and the pri-

soner's wife get two pints of porter at Mrs. *Blacket's*, and that they brought them to them into the tap-room. Mrs. *Murphy* went out for a penny bun, and when she returned she took a pint, but did not finish it; one of the pints was mulled.

Tobias Mansfield, an apothecary, stated, that he happened to be passing, and saw two persons complaining of some porter being bad; witness drained it out, and found salt petre at the bottom of the porter, which was warm. The woman complained of pain in her stomach, and witness gave her an emetic. She drank three-fourths of a pint; witness thought it would cause serious injury.

Richard Barrett stated, that he was present when the prisoner was arrested; witness said the police were coming to take him, and the prisoner asked, was the woman dead?

William Murphy, M. D., stated, that two ounces of salt petre would poison any one.

Richard Oates stated, that he found salt petre in *Barrett's* pockets; and that he heard the prisoner say, that his wife wished to spend all his money, and that the devil seemed to melt it.

The case for the prosecution being closed, *Flanagan*, for the prisoner, contended that the indictment was not sustained by the evidence; that the prisoner should have been indicted as an accessary before the fact, for administering poison with intent to murder, and not under the 9th section of the 10 G. IV. c. 34, it appearing by the evidence, that *James Barrett* (the approver) actually administered the salt petre to *Catherine Murphy*; and that

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the 9th section of the 10 G. IV. c. 34, making the solicitation to commit murder a capital felony, was impliedly repealed by the subsequent statute of 1 Vict. c. 85, s. 3, making the attempt to administer poison, with intent to commit murder, a transportable felony. The learned Judge, however, after having heard the counsel for the Crown in reply, left the case to the jury upon the evidence generally, stating that he would reserve these questions for the consideration of the Judges; and he requested the jury, if they believed the evidence, and found a verdict of guilty, to inform him whether they were of opinion that the solicitation had been to murder generally, or to administer salt petre with intent to murder; and that the salt petre had been administered, or only attempted to be administered. The jury found the prisoner guilty, and in compliance with the request of the learned Judge, informed him that they were of opinion that the solicitation had been to administer salt petre with intent to poison, and that the salt petre had been attempted to be administered.

The question, whether the conviction, under the foregoing circumstances, was good, having been reserved for the opinion of the Judges, the case was argued before ten of their Lordships (*Doherty*, C. J. C. Pleas, and *Woulfe*, C. B., being absent), by *Flanagan* for the prisoner, and *G. Bennett* for the Crown. SIX Judges (BUSHE, C. J., BURTON, J., PENNEFATHER, B., CRAMPTON, J., RICHARDS, B., and BALL, J.,) were of opinion, that the conviction was good. The remaining four held that it was bad.

Perrin, J., subsequently recommended a commutation of the punishment, to transportation for life.

CHARTERS, Appellant—GILROY, Respondent. *June* 19, 1840.

Assistant Barristers have, under the 6 & 7 W. 4, c. 75, s. 2, jurisdiction to hear and determine disputes and differences respecting the possession of lands held from year to year.

At the Spring Assizes for the county of *Fermanagh* in 1840, a question was raised before *Foster*, B., upon an appeal from a civil bill decree of the Assistant Barrister of the county, which the learned Baron reserved for the consideration of the Judges.

The question was, whether land which is held by a tenancy from year to year is within the meaning of "lands, tenements, and hereditaments, held under any "grant, lease, or other instrument," as these words are used in the 6 & 7 W. IV. c. 75, s. 2?

Ten Judges (*Doherty*, C. J., and *Woulfe*, C. B., being absent) unanimously held, that leases from year to year are included in the enactment.

June 19, 1840. MURPHY, in Replevin, Appellant—BUTLER and Others, Respondents.

The 6th section of the 6 & 7 W. 4, c. 75, prescribing a notice to be given by the party distraining to the party distrained, is mandatory.

THE respondents, as trustees of the estates of the Earl of *Carrick*, a minor, distrained the appellant, a tenant holding from year to year, for rent. At the time of making this distress the respondents caused the following notice to be served on the appellant by their bailiff:—"Take notice "that I have distrained your oats, consisting of in or about "38 barrels, for rent and arrears of rent due to the trus- "tees of the Earl of *Carrick*, on the lands of *Newtown*.

"To William Murphy.

"Oct. 7th, 1839.

"GREGORY ROACH."

On the 9th of October, 1839, the appellant obtained the usual replevin order from the Sheriff, and in that way obtained back his property which had been so distrained. The replevin civil bill suit thus instituted came on before the Assistant Barrister at the following quarter Sessions, when he dismissed the civil bill. From that decision the plaintiff in the civil bill suit appealed, and the case came on before *Richards*, B., at the Spring Assizes for the City of *Kilkenny*, in 1840. The learned Baron was of opinion upon the merits with the respondents, and was prepared to decree for the respondents for the arrear of rent due to the gale day preceding the distress, and to order that the replevin bond entered into by the appellant should be assigned over. The appellant, however, insisted, that the notice served on him at the time of the distress was not conformable to the

provisions of the 6 & 7 Wm. IV. c. 75, s. 6(*a*), and that the learned Baron had no jurisdiction to make any decree against him; that whether he owed rent or not, he was entitled to recover damages in the civil bill suit instituted by him against them; that the words in the Act of Parliament relating to the service of notice were not directory merely, but mandatory; and that the respondents not having served a notice such as prescribed by the Act of Parliament in distraining for rent, were trespassers.

Contradictory decisions by various previous Judges upon the construction of this clause in the statute having been cited, the learned Baron reserved the following question for the consideration of the Judges: Whether he was bound to have made a decree in favor of the appellant on account of the insufficiency of the notice served on him at the time of the distress, notwithstanding that there was an arrear of rent due to the defendants at the time of the distress, and that the defendants had, in the opinion of the learned Baron, a lawful right to distrain for the same?

THE JUDGES met to consider this case, which was discussed at considerable length on the 18th and 19th of June. On the latter day it was decided by SEVEN out of ten Judges, (*Doherty*, C. J., and *Woulfe*, C. B., being absent,) that the clause in question is mandatory upon the landlord; the other three Judges holding that it is directory only.

(*a*) Under which the particular of the rent demanded must specify the amount, and the time or times when the same accrued due.

Nov. 1840. In the Matter of a TRAVERSE for inutility of a Road Presentment, County FERMANAGH.

The two days' notice of a road traverse for inutility required by the 133rd sec. of the 6 & 7 W. 4, c. 116, means a notice within two days of the first Sessions at which the application for the road was approved, under s. 27 of that act, and not within two days of the Sessions after the Assizes, under s. 28.

At the *Enniskillen* Summer Assizes, in 1840, a traverse was taken to a road presentment for inutility. The presentment was, to make 606 perches of a new road from *Belturbet* to *Derygonelly*, at £1 7*s.* 6*d.* per perch, payable by six instalments. The application had been made at the January presentment sessions, in 1840, and there approved of. The county surveyor was directed to prepare the necessary plans, specifications, and maps, in pursuance of the provisions of the 27th section of the 6 & 7 Wm. IV. c. 116. These were laid before the Grand Jury, at the following Spring Assizes, and there certified; and subsequently, they were laid before the presentment sessions next following, viz: the May sessions, and there approved of and adopted, pursuant to the 28th section. At the Summer Assizes following, the Grand Jury made the presentment above stated, and it was traversed for inutility. No notice of an intention to traverse was served within two days of the first day of the *January* sessions, at which the application was first made; but a notice was served within the two first days of the *May* sessions, at which the application, specifications, and plans, were considered, approved, and adopted.

It was objected on the part of those concerned for the presentment, that the notice given in this case was too late, and that the notice required by the 133d section of the Act must be served within two days after the first day of the presentment sessions at which the application was first made, viz: the *January* sessions; and *Murphy's* case, 1 Cr. and Dix's Circuit Cases 222, was relied upon.

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Co. Fermanagh Road Traverse.

Pennefather, B. ordered a jury to be impannelled, to try the traverse, subject to the objection. The jury not agreeing, they were discharged; and the learned Baron reserved for the opinion of the Judges the question, whether the traverse could properly be taken at the Summer Assizes, the notice of the intention to traverse not having been given until the May sessions.

Eight Judges (*Johnson*, J. being absent; *Brady*, C. B., *Pennefather*, B., and *Richards*, B., *dissentientibus*,) decided against the traverse, on the ground that the notice was too late.

Nov. 27, 1840.

In the Matter of a JUDGE'S ORDER for the repayment of sums advanced by Government to the SHANNON COMMISSIONERS.

A certificate of the Shannon Navigation Commissioners ascertaining the sums repayable by a county, under the 2 & 3 Vict. c. 61, s. 64, is not defective for stating that a particular sum is to be levied off one barony, and for being silent as to the proportions to be levied off the other baronies; and the Judge of Assize is authorized, upon the refusal of the Grand Jury to present in pursuance of such a certificate, to make an order under section 65, directing the specified sum to be levied off that one barony, and the residue rateably off the other baronies.

THE following certificate, under the hand and seal of two of the Commissioners for the improvement of the river *Shannon*, appointed under the 2 and 3 Vict. c. 61, was laid before the Grand Jury of the county of *Mayo*, at the Summer Assizes in 1840, by their secretary, to whom it had been transmitted by the directions of the commissioners.

" Whereas, in pursuance of the provisions of an Act of " Parliament passed in the 2d and 3d years of the reign of " her present Majesty Queen Victoria, entitled, ' An Act " ' for the improvement of the navigation of the river " ' *Shannon*,' we, Sir *John Fox Burgoyne*, *Harry David* " *Jones*, and *Richard Griffith*, being the commissioners " duly constituted and appointed for the execution of said " Act of Parliament, have caused an account to be taken

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" of all monies which have been issued to us as such com-
" missioners by the commissioners of her Majesty's trea-
" sury, in Exchequer bills or cash, for the purposes of said
" Act of Parliament, from the commencement of said Act
" of Parliament up to the 15th day of June, in the year of
" our Lord 1840, being the day up to which said account
" was so taken. And whereas we have also ascertained,
" having had regard to the awards mentioned in said Act
" of Parliament, and pursuant to the provisions of said
" Act, that the sum of £1181 15*s.* 8*d.* is the amount of
" said monies now repayable by the said county of *Mayo*,
" and that the same is now repayable with interest, at the
" rate of £4 per cent. per annum: Now we, the said Sir
" *John Fox Burgoyne*, *Harry David Jones*, and *Richard*
" *Griffith*, as such commissioners as aforesaid, having had
" regard to the said account and awards and to the pro-
" visions of said Act of Parliament, do hereby, in pursu-
" ance of said Act, certify under our hands, that the sum
" of £1203 3*s.* 1½*d.* being the amount of said principal
" sum of £1181 15*s.* 8*d.*, together with the sum of
" £21 7*s.* 5½*d.*, for interest thereon, from the time
" when the said monies were issued to us as aforesaid, up
" to the said 15th day of June, 1840, is the sum now re-
" payable by said county of *Mayo*, as aforesaid, and that
" the same is to be presented at the next ensuing assizes,
" by the Grand Jury of said county. And we hereby
" further certify and specify that the said sum of £1203
" 3*s.* 1½*d.* is to be raised and levied as follows: that is to
" say—that the sum of £57 15*s.* 2¼*d.* being part of said
" sum, is to be raised and levied upon and off the barony
" of *Costelloe*, in said county; and that the sum of
" £1145 7*s.* 11¼*d.*, being the residue of said sum of
" £1203 3*s.* 1½*d.*, is to be raised and levied upon and off the

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" other baronies of said county. And we hereby further " certify that the said several sums, making together the " said sum of £1203 3*s.* 1½*d.* are to be repaid and levied " by such instalments and with such interest as in said Act " of Parliament is specified. All which we certify under " our hands and seals this 8th day of July, 1840.

" J. F. BURGOYNE.

" HARRY D. JONES."

The Grand Jury refused to present the sum specified in the certificate, or any sum, and insisted that it was most unjust to charge the county of *Mayo* with the sum demanded, or with any part of it. They also insisted that the certificate was not in conformity with the 2 and 3 Vic. c. 61, s. 65, inasmuch as it did not state (except in respect to the barony of *Costelloe*,) the particular sum that each of the other baronies should contribute to make up the residue of the sum demanded over and above the sum required from the barony of *Costelloe*: that it was evident that the entire sum was not to be levied generally off the county at large, (a particular sum being applotted on one barony,) and therefore that the commissioners were bound to specify in their certificate what sum should be raised by each of the other baronies; the words of s. 65 of the Act being, that the sum " shall be raised and levied from and " off the county at large, *or* from and off the barony or ba- " ronies named in such certificate and order." The Grand Jury complained that they were at a loss from the manner in which the certificate was prepared to ascertain how and in what proportion they should allocate the residue of the sum demanded amongst the other baronies; and in the end they refused to present for any sum whatsoever.

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Richards, B., (the Judge of assize) was then called on by the crown solicitor and counsel, to direct that the sum specified in the certificate should be placed on the levy, and inserted in the treasurer's warrant, by an order pursuant to the 65th section of the Act; which his lordship accordingly did, by an order which recited the certificate, and directed that £57 should be levied off the barony of *Costelloe*, " and the residue off the other baronies;" and that the several sums should be levied by such instalments, and with such interest as the statute specified.

The Grand Jury, however, strongly resisted this measure, on the grounds before mentioned; and further insisted that it never could have been intended by the commissioners that the several baronies of the county (with the exception of *Costelloe*,) should contribute each in proportion to the number of acres chargeable with county cess contained therein respectively, to make up the sum demanded; some of the baronies, and the largest of them, lying much more remote than others from the *Shannon*, and some of them being altogether incapable of receiving any kind of benefit from the contemplated improvement of the navigation of that river, as they alleged. Under these circumstances the learned Baron thought it right to respite the presentment, and to obtain the opinion of the Judges, as to whether he was right in making the order in question, under the circumstances above detailed.

NINE JUDGES, (*Brady*, C. B., *Perrin*, J., and *Richards*, B., being absent,) unanimously decided against the objections, and in favor of the Judge's order.

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1. Held, that a presentment for the re-payment of money advanced by the Lord Lieutenant out of the consolidated fund, under the 58 G. III. c. 47, and 2 Wm. IV. c. 9, to the Boards of Health established in different districts of a county, should be raised off the county at large, and not off the respective districts. *Mayo Presentment.* 171
2. Held, that the 6 G. IV. c. 101, s. 5, and the 1 and 2 Wm. IV. c. 33, s. 107, as to presentments by Grand Juries of sums equal to those advanced out of the consolidated fund, for the repair of roads, were imperative upon the Grand Jury. *Roscommon Presentments.* 172
3. The Judge may make an order for the re-payment of advances out of the consolidated fund, under the 6 G. IV. c. 54, s. 2, although the assizes next after the order of council had been passed by. *Carlow Presentment.* 188

See TREASURER, GOVERNMENT ADVANCES.

CONTRA FORMAM STATUTI.

Held, that it was no valid objection that an indictment for abduction (under the 19 G. 2, c. 13,) concluded against the form of the "statute" instead of "statutes". *Rex* v. *Browne.* 21

CONTRACTOR.

A presentment in the form of a general authority to the treasurer to make advances to contractors in every case where the sum should exceed £20, held not to be warranted by the 3 and 4 Wm. IV. c. 78, s. 49. (6 and 7 Wm. IV. c. 116, s. 128.) *Co. Wicklow Presentment.* 191

See BRIDGES, ROADS.

CONVICTION.

On the trial of an accessary before the fact to a felony, the proper evidence of the conviction of the principal felon at a former assizes for the same county, is a record of the conviction, and not the crown book. *Rex* v. *Dwyer,* 198; *Regina* v. *Robinson.* 286

CORONER.

1. A person who acts as a coroner merely within the limits of a borough, is a coroner within the meaning of the 6 and 7 Wm. IV. c. 116, s. 97, so as to entitle him to a presentment. The maximum presentable for each Coroner, under the 6 and 7 Wm. IV. c. 116, s. 97, is £2 for each inquest, even although that should exceed £30. *Cavan Presentment.* 211
2. The maximum presentable for all the Coroners in the county of *Cavan,* is £90. *Ibid.*
3. Where £90 is the maximum presentable for all the Coroners of a county, if the number of inquests has been such that a payment of £2 for each inquest would make a sum exceeding £90 in the whole, then each Coroner is to abate according to his number of inquests, until the sum is reduced to £90. *Ibid.*
4. Where the magistrates at sessions left blanks in some of the numbers in the schedule relating to presentments for coroners, on account of doubts which they felt as to the sums to be inserted; held, that it was competent to the Grand Jury to fill up these blanks, after having been advised by the Judge, notwithstanding the 6 and 7 Wm. IV. c. 116, s. 47. *Ibid.*
5. Quære, whether the maximum presentable for all the Coroners of a county is to be regulated by the

number of Coroners allowed by schedule S of the 6 and 7 Wm. IV. c. 116, or by the actual number of Coroners, where the number is less than the schedule of the Act allows? *Ibid.*

6. The magistrates and cess-payers at presentment sessions have power to reduce the sum ordered by a Coroner to be paid to a medical witness, under the 6 and 7 Wm. IV. c. 116, s. 99; and the Grand Jury have no power to increase it afterwards, so as to make it conformable to the Coroner's order. The Judge at the assizes must fiat the presentment as it came from sessions, *Co. Clare Presentment.* 247

COUNSEL.

See RESERVED CASES.

COUNTY.

See PRESENTMENT, 13.

COURT HOUSE.

1. A presentment of a sum for additional works done in a new Court house, not included in the original contract, is illegal, under the 53 G. III. c. 131. *Cavan Presentment.* 45
2. A traverse does not lie to a presentment for a new county Court house, duly made according to the 53 Geo. III. c. 131. *Cork Presentment.* 117

COWS.

Cows are not chattels within the meaning of the 9 Geo. IV. c. 55, ss. 40, 41, 42. *Rex* v. *Deneny.* 255

CRIERS.

1. Criers are not prohibited by statute from taking any fees, except those which had been formerly paid by presentment, and are now commuted for salary.—Schedule of fees to which the crier is entitled. *In re Officers' fees.* 33
2. The fee of 5*s.* paid by the party traversing to the Crier upon the trial of a road traverse for damages, is a lawful one, and may be received by him, notwithstanding the 6 & 7 Wm. IV. c. 116, s. 110. But it is not to be included in the verdict as part of the damages sustained. *Fermanagh Traverse,* 222; *Clare Presentment.* 272

DEGRADED CLERGYMAN.

1. An exemplification of the sentence of degradation under the episcopal seal is not necessary evidence to support an indictment against a person alleged to be a degraded clergyman, for celebrating a marriage between Protestants. *Rex* v. *Stonage.* 121
2. On the trial of a degraded clergyman for celebrating a marriage between a Protestant and a Roman Catholic, an entry, signed by the Registrar of the Consistorial Court, of the sentence of degradation, in a book, which contained also an entry of the previous proceedings, is sufficient evidence of the degradation. *Rex* v. *Sandys.* 166

DEMANDING WITH INTENT TO STEAL.

The demand of a gun from the owner's mother, in the house of the owner, where his mother lived, is sufficient to support an indictment for demanding property with intent to steal, although the gun was not in the house, or in the mother's possession, at the time of the demand. *Rex* v. *M'Bennet.* 148

DESERTED CHILDREN.

Held, that under the 11 and 12 Geo. III. c. 15, and 13 and 14 Geo. III. c. 24, there could be only one order for a sum not exceeding £5, for each deserted child. *Armagh Presentment.* 184

DESERTER.

The traverser was indicted under the Mutiny Act of 1834, for voluntarily delivering himself up as a deserter

and was also presented as a vagrant. The jury found against the traverser upon the indictment, and for him upon the presentment. Held, that no judgment could be pronounced against him, and that he ought to be discharged. *Rex* v. *M'Clusky.* 162

DISPENSARIES.

See MEDICAL CHARITIES.

DRAFT.

A person finding a draft upon a banker, and tendering it for payment, with the intention of converting the proceeds to his own use, knowing, at the time, that he is not the person entitled to receive the amount, is guilty of felony.—"Draft and order for payment of money," is a sufficient description within the meaning of a statute which makes the stealing of a warrant for payment of money," felony. *Rex* v. *Beard.* 9

DWELLING-HOUSE.

An indictment for burglary in a gate house, stating it to be the dwelling-house of the *gate-keeper*, is bad.

An indictment under the Whiteboy Act for an injury to a gate-house, stating it to be the "dwelling-house and habitation" of the gate-keeper, is sufficient. *Rex* v. *Cahill.* 36

ELECTION NOTICES.

See CLERK OF THE PEACE, 1.

EMBEZZLEMENT.

The prisoner was a runner of the bank of Ireland till six o'clock every day, and after six to G. and W., public notaries. Before six o'clock one day he received from D. money to pay bills of exchange, which had been discounted by the bank, and of which, owing to some mistake, payment could not be received at the bank. The prisoner promised to pay them at the office of G. and W. The same evening, after six o'clock, he paid a part only, and returned to B. some of the bills, as if they had been paid, keeping the rest of the money and bills. Held, that the bills and money were received by the prisoner as the servant and clerk of G. and W., and that therefore a conviction for embezzlement in that character under the statute was good. *Rex* v. *Gourlay.* 82

ESCAPE.

Where a prisoner was convicted upon an indictment under the 51 Geo. III. c. 63, s. 6, for an escape from prison, the former conviction (which was proved by a certificate from the crown office,) having been under the 1 Vic. c. 87, ss. 6 & 10, and the sentence six months imprisonment; Held that the conviction was bad, as the escape did not come within the 51 Geo. III. c. 63. *Regina* v. *Meany.* 249

EVIDENCE.

1. A man jointly indicted with others, and who has pleaded not guilty, cannot be a witness for the prosecution, whilst his plea stands. *Rex* v. *Ryan.* 5
2. The prosecutor's wife is a competent witness for the defence. *Rex* v. *Houlton.* 24
3. It is no objection to the testimony of a wife that she is brought to contradict the testimony of her husband. *Ibid.*
4. Where husband and wife are both concerned in a highway robbery, the presence of the husband is only presumptive evidence of coercion exercised by him over the wife. *Rex* v. *Stapleton.* 93
5. The passing of a presentment is *primâ facie* evidence of the legality of proceedings under the 59 Geo. III. c. 84, on the part of a person who has obtained a road presentment. *Queen's County Presentment.* 40

6. The receiver of a stolen promissory note was indicted for a substantive felony under the 9 Geo. IV. c. 55, s. 47; and a witness for the crown proved that he (witness,) had stolen the note; but it appeared on his cross examination that he had been tried for the larceny and acquitted, a fact of which the Judge had judicial knowledge. Held, that the acquittal of the principal was not conclusive evidence of his innocence, but that the Judge was right in leaving to the jury the fact of the acquittal, together with the witness's averment of the theft. *Rex* v. *M'Cue.* 120

7. An exemplification of the sentence of degradation under the episcopal seal is not necessary evidence to support an indictment against a person alleged to be a degraded clergyman, for celebrating a marriage between Protestants. *Rex* v. *Stonage.* 121

8. On the trial of a degraded clergyman for celebrating a marriage between a Protestant and a Roman Catholic, an entry signed by the registrar of the Consistorial Court, of the sentence of degradation, in a book, which contained also an entry of the previous proceedings, is sufficient evidence of the degradation. *Rex* v. *Sandys.* 166

9. Where a witness, after having been examined for the prosecution, fainted shortly after the commencement of his cross examination, so as to render it impossible for him to give any further evidence; Held by seven Judges against five, that a conviction upon such evidence as had been already given by this witness, taken together with the evidence of other witnesses, was good. *Rex* v. *Doolin.* 123

10. The demand of a gun from the owner's mother, in the house of the owner, where his mother lived, is sufficient to support an indictment for demanding property with intent to steal, although the gun was not in the house, or in the mother's possession at the time of the demand. *Rex* v. *M'Bennet.* 148

11. An indictment for sending to the Lord Lieutenant a false recommendation of persons convicted charged that the prisoner forged the signature of "T. King, rector of T.;" the evidence was, that the name forged by the prisoner was "T. Knox, rector of T." The Judge having given leave to amend, by substituting "Knox" for "King;" Held that there was no fatal variance on the ground of its appearing in evidence that T. Knox was in fact rector of A, and that there was no such parish as that of T. Held also, that proof of the document which contained the false recommendation being in the prisoner's handwriting, and dated in the county in which the venue was laid, was sufficient evidence of acts done in that county. *Rex* v. *Dwyer.* 198

12. To prove a conviction which took place at a former assizes, the record thereof, and not the crown book, is the best evidence. *Ibid.*

13. On the trial of an accessary before the fact to a felony, the proper evidence of the conviction of the principal felon at a former assizes for the same county, is a record of the conviction, and not the crown book. *Regina* v. *Robinson.* 286

See Accomplice, Bigamy, Civil Bill, Confession, Forgery, Hand-writing, Manslaughter, Perjury, Poisoning, Shooting at, Unlawful Oaths, Whiteboy.

EXCISE.

The Grand Jury having rejected a presentment for the re-payment of the Collector of Excise, under the 7 Geo. IV. c. 74, s. 56, and the Judge at the same assizes having omitted to add the amount to the Treasurer's warrant, under s. 132 of the same Act; Held, that the Judge at the assizes next but one after had authority to order it

to be so added. *Galway Presentment.* 160

FAC SIMILE.

Held, that a prisoner might be convicted of uttering a forged instrument, although the instrument when given in evidence was so mutilated that it could not be decyphered without the aid of a fac simile. *Rex* v. *Woods.* 115

FEES.

See BURNING, 3, CLERKS OF THE CROWN, CRIERS, TRAVERSE, 3.

FELONY.

1. A person finding a draft upon a banker, and tendering it for payment, with the intention of converting the proceeds to his own use, knowing, at the time, that he is not the person entitled to receive the amount, is guilty of felony.—"*Draft* and *order* for payment of money" is a sufficient description within the meaning of a statute which makes the stealing of a warrant for payment of money, felony. *Rex* v. *Beard.* 9
2. The 27 Geo. III. c. 15, s. 10, so far as it relates to the taking of arms, without the consent of the owner, is repealed by the 1 and 2 Wm. IV. c. 44, s. 2, and therefore an indictment for such an offence, as for a felony, cannot be supported. *Rex* v. *Maguire.* 132

FORGERY.

1. An indictment for having in possession a forged note of the Royal Bank of Scotland, with intent to utter it, cannot be supported at common law. *Rex* v. *Fulton.* 48
2. The prisoner was convicted on an indictment for having in his possession a forged note of the Bank of *Ireland.* The first count set out the note, with the name of a signing clerk annexed; the second set it out, as if the name of the signing clerk had been obliterated. The note, when produced, agreed with that set out in the second count; but no evidence was given as to the obliteration. *Held,* that the conviction was bad. *Rex* v. *Getty.* 59
3. Where the prisoner was present at a sale of goods by the prosecutor to a third person, (who was introduced by the prisoner to the prosecutor, as a purchaser,) and took up a bank note given by that person in payment, saying that it was good, and that he would make it good; and desired the prosecutor to write his (prisoner's) name upon it; the note proving a forgery, held, that there was sufficient evidence of *uttering* by the prisoner. *Rex* v. *Cushlan.* 113.
4. Held that a prisoner might be convicted of uttering a forged instrument, although the instrument, when given in evidence, was so mutilated, that it could not be decyphered without the aid of a *fac simile.* *Rex* v. *Woods.* 115
5. Conviction for forgery. The indictment stated that the prisoner falsely altered a receipt for rent, which, previously to such alteration, was as follows:—"Ennis, 3d April, 1837, Received from J. and J. G., £7 7*s.* 7*d.* on account of rent," &c. as at foot.—*P. Curtin.* Dec. 3d, cash per J. G., £3 6*s.* Cash this day, per do. £4 1*s.* 7*d.*; total, £7 7*s.* 7*d.*" The alteration was effected by erasing the lines following the words "P. Curtin." The indictment did not state any further circumstances, showing that such an erasure constituted a forgery; but it appeared in evidence that two separate receipts had been previously given for the two sums mentioned in the erased lines, and that the prisoner's object was to get credit for the other sum as a separate payment. Held, that the conviction was right.

Semble, that reading out a document, although the party refuses to show it, is a sufficient uttering. *Regina* v. *Green.* 282

FOUNDLING.

See DESERTED CHILDREN.

GAOL.

1. The Judge of Assize has a discretion to withhold his approbation to the appointment by the Grand Jury of a new Inspector of a county gaol, under the 7 Geo. IV. c. 74. *Cavan Presentment.* 95
2. Where the magistrates and cess-payers at a special sessions under the 3 & 4 Wm. IV. c. 78, had reduced the gaoler's salary from its former amount; Held, that the Grand Jury at the assizes following had power under the 7 Geo. IV. c. 74, s. 64, (notwithstanding the 3 & 4 Wm. IV. c. 78, s. 69,) to present for the full amount of the former salary. *Drogheda Presentment.* 194

See MEDICAL OFFICERS, 1.

GATE HOUSE.

See BURGLARY, WHITEBOY.

GOVERNMENT ADVANCES.

An application having been made, by direction of the Lord Lieutenant, to a Grand Jury, to present the amount of arrears due to government 19 years before, for advances made by government for a board of health, and the Grand Jury having refused on account of the length of time which had elapsed; Held that the Judge of Assize was authorized to make an order for the amount, under s. 179 of the 6 and 7 Wm. IV. c. 116. *Queen's County Presentment.* 235

GRAND JURY.

See PRESENTMENT.

HAND-WRITING.

1. To negative hand-writing, it is sufficient evidence if the supposed writer can state his positive knowledge, *from circumstances*, that the writing cannot be his, although he also states that he cannot, even upon his belief, on a mere inspection of the writing, say whether it is his or not. *Rex* v. *Walsh.* 38
2. Evidence of the prisoner's hand-writing by a witness who had never seen him write, but who swore he was enabled to form a belief from opportunities which he had had of knowing his hand-writing, independently of comparison; *Held* sufficient, without any other evidence that the prisoner knew how to write. *Rex* v. *Mara.* 75

HARD LABOUR.

See SENTENCE, 1.

HUSBAND AND WIFE.

1. The prosecutor's wife is a competent witness for the defence. It is no objection to the testimony of a wife that she is brought to contradict the testimony of her husband. *Rex* v. *Houlton.* 24
2. Where husband and wife are both concerned in a highway robbery, the presence of the husband at the commission of the offence, is only presumptive evidence of coercion exercised by him over the wife. *Semble,* that in a case of highway robbery, coercion by the husband is not a defence for the wife. *Rex* v. *Stapleton.* 93

INDICTMENT.

1. An indictment under the 27 Geo. III. c. 15, s. 10, will be sustained by evidence of supplying ammunition to a person who only pretended to get it for the use of the Whiteboys. *Rex* v. *Heffernan.* 2
2. Indictment for inciting persons not to enter into the employment of R. S. The evidence showed that those persons had entered into the employment of, and worked for R. S. The prisoners being convicted, two questions were reserved—first, whether the offence charged was an offence at common law; and secondly, if it were, whether the evidence sup-

ported the indictment. Held, that the indictment was bad, and the conviction wrong. *Rex* v. *Pettit.* 151

3. An indictment charging that the prisoner did, by threats and menaces, threaten violence to the person of one J. G., in the event of his not taking back into his employment a certain man whom he had then lately before discharged from his service, is bad. *Rex* v. *Flannery.* 243

And see the different heads.

INFIRMARY.

See MEDICAL OFFICERS, 3, 4, 5, MEDICAL CHARITIES.

INSPECTOR.

See GAOL.

JUDGMENT.

See SENTENCE.

JURY.

1. A juror having been by mistake entered upon the panel, and called and sworn by a wrong name, and an objection having been taken before verdict; *held,* that there was a mistrial. *Rex* v. *Deleany.* 88

2. Where on a trial at a special commission, the jury could not agree, and after remaining a long time shut up, were discharged by the court, (no consent being given by the counsel on either side,) in consequence of the physician's report that a longer confinement would endanger the lives of some of them; *Held,* that they were properly so discharged, and that the prisoners were triable again; and that they might have been tried at the same commission if the Judge had thought proper. *Rex* v. *Barrett.* 103

3. Where the Judge took it upon himself to discharge the jury, in consequence of a statement upon oath by one of the jurors, (without the examination of a medical man,) that his life would be endangered by a longer confinement, and to remand the prisoner; *Held,* that the Judge had acted rightly, and that the prisoner was not entitled to be discharged. *Rex* v. *Delany & Cheevers.* 106

4. The prisoner peremptorily challenged one of the jury on his coming to the book; the Court refused to receive the challenge, and the juryman was sworn. When judgment was about to be pronounced, the prisoner's counsel tendered a plea, praying a reverse of the judgment, because of the challenge not having been allowed, which plea the Court refused to receive. Held, that the Court was right in refusing to receive it. *Rex* v. *Adams and Langton.* 135

5. Since the passing of the 6 and 7 Wm. IV. c. 116, no presentments can be made to remunerate clerks of the peace for providing and copying jurors' books, and preparing precepts and returns under ss. 5 & 9 of the Jurors' Act, 3 & 4 Wm. IV. c. 91. *Cavan Presentment.* 216

6. After the prisoner had been given in charge, it appeared that the prosecutrix, a child of four years of age, did not sufficiently understand the nature of an oath; and it was admitted on the part of the crown, that there was no other evidence to sustain the case. Held, that the prisoner was entitled to an acquittal. *Regina* v. *Oulaghan.* 270

LARCENY.

1. A person entrusted to drive a number of sheep a certain distance, and on the way separating one of them from the rest, with the intention of fraudulently converting it to his own use, is not guilty of larceny. In such a case the *animus furandi* upon the original taking should be left to the jury. *Rex* v. *Reilly.* 51

2. The prisoner was convicted on an indictment purporting to be for highway robbery, but omitting the words as *to taking from the person*

of the prosecutor. *Held*, that this was a bad conviction for highway robbery, but good for larceny. *Rex* v. *Rogan* 62

LETTERS.

In an indictment for robbing a mail of a bag of letters, it is not necessary to state an asportation, but it is sufficient to use the words of the statute. *Rex* v. *Rossiter.* 50

LUNATIC ASYLUM.

See MEDICAL CHARITIES, 4.

MALICE.

The prisoner was convicted upon two indictments, one for shooting at A, with intent to kill him, and the other for shooting at B, with intent to kill him; the jury finding that he intended to kill whichever the shot should strike, but not both. *Held*, that he was rightly convicted. *Rex* v. *Larkin.* 60

MALICIOUS INJURIES.

Held, by six Judges against five, that s. 70 of the 3 & 4 Wm. IV. c. 78, repealed all former laws on the subject of malicious injuries to property, and that therefore the malicious burning of a pew in a Roman Catholic chapel, while the country was in a state of disturbance merely arising from an election, was a proper subject for compensation, though not an injury under the *Whiteboy* Act, and that the notices and examinations required by the former laws were no longer necessary. *Carlow Presentment.* 180

See BURNING.

MANOR COURT.

Held, that a seneschal of a Manor Court, within the jurisdiction of which there was no local prison, was not liable under the 7 Geo. IV. c. 74, s. 99, to pay for the support of prisoners in the county gaol, under execution from the Manor Court; the seneschal not being able to refuse executions, nor paid by fees upon them, nor allowed to direct the process to any one except the permanent bailiffs, who were so paid. *Co. Antrim Presentment.* 239

MANSLAUGHTER.

1. A conviction for manslaughter is sustainable, although there has been no coroner's inquest, or examination of the body, or evidence of medical witnesses, as to the cause of death, it being sufficient if the cause of death be proved by circumstantial evidence. *Rex* v. *Dogherty.* 66
2. Shooting a sheriff's bailiff who attempts to arrest under a warrant regular on the face of it, but dated prior to the writ on which it is founded, *held* to be manslaughter only. *Rex* v. *Deleany.* 88

MARRIAGE.

See BIGAMY, DEGRADED CLERGYMAN.

MEDICAL CHARITIES.

1. Where a dispensary has been established, and all the requisites prescribed by section 81 of the 6 & 7 Wm. IV. c. 116, performed, it is obligatory on the Grand Jury to make the presentment required by that section, and they cannot refuse to make it on the ground that they consider it unnecessary. *Kerry Presentment.* 277
2. In the case of fever hospitals, the Grand Jury have a discretion to present less than the amount of private subscriptions, under s. 81 of the 6 and 7 Wm. IV. c. 116. Quære, whether they have any such discretion in the case of dispensaries under that Act? *Ibid.*
3. *Held*, that they had such a power under the 58 Geo. III. c. 47. *Queen's County Presentment.* 130
4. A presentment at a summer assizes, for a lunatic asylum depot, not connected with any house of industry, is bad, under s. 89 of the

6 and 7 Wm. IV. c. 116. *Kerry Presentment.* 277

MEDICAL OFFICERS.

1. Where there was but one medical officer to a county gaol, the Grand Jury were bound to present for him the entire sum mentioned in the schedule to the 4 Geo. IV. c. 43. *Wicklow Presentment.* 43
2. A medical officer cannot be lawfully appointed by a county Grand Jury for a bridewell. The amount of a bill for medicines for prisoners in a bridewell may be presented, if furnished by the apothecary of the county gaol, but not otherwise. *Wicklow Presentment.* 44
3. A presentment of a salary to a surgeon for attending a gaol under the 7 G. IV. c. 74, s. 72, in addition to his salary under the 5 G. III. c. 20, and 54 Geo. III. c. 62, (infirmary Acts,) held to be illegal. *Cavan Presentment.* 86
4. Held, by six Judges against five, that the 6 and 7 Wm. IV. c. 116, s. 86, does not render it imperative upon the Grand Jury to make a presentment for the surgeon of the infirmary who tenders his services to the prisoners in the gaol, where there has been a surgeon previously appointed for the gaol by the Grand Jury, and paid by presentment. *Monaghan Presentment.* 217
5. A presentment of £300 a-year for two surgeons of a county infirmary, out of the funds of the institution, (which funds consisted of money supplied by presentment, of public money under the 5 Geo. III. c. 20, and of subscriptions,) held illegal. *Clare Presentment.* 274

MEDICAL WITNESS.

The Magistrates and cess-payers at presentment sessions have power to reduce the sum ordered by a coroner to be paid to a medical witness, under the 6 and 7 Wm. IV. c. 116, s. 99 ; and the Grand Jury have no power to increase it afterwards, so as to make it conformable to the coroner's order. The Judge at the assizes must fiat the presentment as it came from sessions. *Co. Clare Presentment.* 247

MISTRIAL.

A juror having been by mistake entered upon the panel, and called and sworn by a wrong name, and an objection having been taken before verdict: held, that there was a mistrial. *Rex* v. *Deleany.* 88

MURDER.

1. An indictment against a woman for the murder of her child, not stating that the child was born alive, but stating that it was exposed by the prisoner, and in consequence "languished, and languishing did live for half an hour, and then died," and "that so the prisoner did kill and murder the child in manner aforesaid," is good. *Semble,* that an indictment for the murder of a "certain male child," without further description, is insufficient.—*Regina* v. *Kelly.* 299
2. Where the Judge omitted, in pronouncing sentence on a conviction for murder, to order that the bodies of the prisoners should be buried within the precincts of the gaol, as directed by the 4 and 5 Wm. IV. c. 26, s. 2; but on a subsequent day, on ruling the book at the close of the same assizes, in the absence of the prisoners, ordered the clause in question to be inserted; held, that the sentence was illegal, notwithstanding the 6 and 7 Wm. IV. c. 30, s. 2. *Regina* v. *Hartnett & Casey.* 302
3. The prisoner was indicted for soliciting J. B. to murder C. M. The evidence was, that the prisoner procured salt petre, and gave it to J. B. to be administered to C. M. and that J. B. administered it accordingly, and that C. M. detected the poison in time to save her life, after having swallowed some of it.

The jury found the prisoner guilty, and stated their opinion to be, that the solicitation was to administer salt petre, with intent to poison, and that the salt petre had been attempted to be administered. Held, that the conviction was good, the prisoner having been rightly indicted as a principal, for soliciting to murder, instead of as an accessary before the fact to the administering of poison with intent to murder; and the 10 Geo. IV. c. 34, s. 9, not having been repealed by the 1 Vic. c. 85, s. 3. *Regina* v. *Murphy*. 315

MUTINY ACT.

See DESERTER.

NOTICE.

See TRAVERSE, 2, 4.

NUNC PRO TUNC.

A presentment cannot be made after the assizes *nunc pro tunc*, where the Grand Jury had, by oversight, omitted to take any steps respecting it at the assizes. *Wicklow Presentment*. 102

OATH.

See UNLAWFUL OATHS.

PARTY PROCESSIONS.

An indictment is maintainable on the first section of the Party Processions' Act, (2 & 3 Wm. IV. c. 118,) taken by itself. *Anonymous*. 155

PEACE PRESERVATION ACT.

See AFFIDAVIT.

PERJURY.

1. Conviction for perjury held bad, where an objection was taken in arrest of judgment that the indictment did not state that the false swearing was with respect to a matter essential to the matter in issue, although it appeared in evidence that it was so. *Rex* v. *Prendergast*. 64
2. An indictment for perjury, stating that the traverser "did maliciously depose and swear," &c. and concluding that so the said traverser "falsely, maliciously, and wickedly, *in manner and form aforesaid*," did commit perjury, is bad. *Rex* v. *Tierney*. 179
3. Indictment for perjury committed upon a trial for burglary. The perjury assigned was, that the prisoner swore upon that trial that he had not heard a certain conversation, whereas in fact he had heard it. To support the charge of perjury, informations were proved (by the evidence of one of the magistrates who took them,) in which the prisoner swore he had heard the conversation; and two witnesses, one of whom was the same magistrate who proved the informations, proved that the prisoner had sworn at the trial that he had not heard it. Held, that a conviction on this evidence was wrong. *Regina* v. *Gaynor*. 262

PERSONATING.

1. An indictment under the 46 Geo. III. c. 69, s. 8, for personating J. H. (a deceased person,) the said J. H. "being then and there a person supposed to be entitled" (or "being a person entitled,") to a certain pension, is bad. *Rex* v. *Keeffe*. 6
2. *Semble*, that a good indictment might be framed for personating a deceased man, in order to receive a pension, although the person applied to for the pension knew that the party personated was dead. *Ibid.*
3. To personate a *deceased* disabled soldier was an offence within the 46 Geo. III. c. 69, s. 8. *Rex* v. *Fitzmaurice*. 29
4. The word "person" applies to the dead as well as to the living. *Ibid.*
5. *Semble*, that an averment that a man had served in a regiment "of our Lord the King," is not supported by evidence that he had served in the reign of the late King. *Ibid.*

PIGS.

An indictment for receiving stolen pigs in Londonderry, is supported by evidence that the pigs were first brought to the prisoner in Donegal, and afterwards sold by him, slaughtered, in Londonderry. *Rex* v. *Connor.* 150

PLEADING.

1. A man jointly indicted with others, and who has pleaded not guilty, cannot be a witness for the prosecution, whilst his plea stands. *Rex* v. *Ryan.* 5
2. "Draft and order for payment of money," is a sufficient description within the meaning of a statute which makes the stealing of a warrant for payment of money, felony. *Rex* v. *Beard.* 9
3. An indictment for abduction stated in one count, that the prisoners, on &c., at &c., upon one H. G., then and there being, did make an assault, and her the said H. G. did carry away. Another count stated, in the same terms, an assault and abduction by persons unknown, and that the prisoners were then and there present, aiding and abetting. Held by eight Judges against three, that the indictment was bad for want of a venue.

It is no valid objection that such an indictment (under 19 G. 2, c. 13) concludes against the form of the "statute," instead of "statutes." *Rex* v. *Browne.* 21

4. The prisoner peremptorily challenged one of the jury on his coming to the box; the Court refused the challenge, and the juryman was sworn. When judgment was about to be pronounced, the prisoner's counsel tendered a plea, praying a reversal of the judgment, because of the challenge not having been allowed, which plea the Court refused to receive. Held that the Court was right in refusing to receive it. *Rex* v. *Adams & Langton.* 135

See FORGERY, 2. LARCENY, 2. LETTERS, PERSONATING, 1.

POISONING.

1. An indictment charged an attempt to poison by mixing a certain noxious and destructive thing called sugar of lead, with flour, and administering the said poison so mixed with flour. The jury found the prisoner guilty, but stated that they could not say what particular kind of poison had been mixed up with the flour. Held that the conviction was good. *Rex* v. *Shannon.* 209
2. The prisoner was indicted for soliciting J. B. to murder C. M. The evidence was, that the prisoner procured saltpetre and gave it to J. B. to be administered to C. M., and that J. B. administered it accordingly, and that C. M. detected the poison in time to save her life after having swallowed some of it. The jury found the prisoner guilty, and stated their opinion to be, that the solicitation was to administer saltpetre with intent to poison, and that the saltpetre had been attempted to be administered. Held that the conviction was good, the prisoner having been rightly indicted, as a principal, for soliciting to murder, instead of as an accessary before the fact to the administering poison with intent to murder; and the 10 Geo. IV. c. 34, s. 9, not having been repealed by the 1 Vict. c. 85, s. 3. *Regina* v. *Murphy.* 315

POST-OFFICE.

See LETTERS.

PRACTICE.

See the different heads.

PRESENTMENT.

1. Where a presentment was made, without being traversed, of a certain sum to be paid by instalments; and at the next assizes a presentment was made of one of these instalments; *Held* that a traverse did not lie to the latter presentment. *Co. Down Presentment.* 20

2. The passing of a presentment is *primâ facie* evidence of the legality of proceedings under the 59 Geo. III. c. 84, on the part of a person who has obtained a road presentment. *Queen's Co. Presentment.* 40
3. A presentment cannot be made after the assizes *nunc pro tunc*, where the Grand Jury had, by oversight, omitted to take any steps respecting it at the assizes. *Wicklow Presentment.* 102
4. The magistrates at special sessions under the 59 Geo. III. c. 84, not having sufficient time to consider all the presentments, (one day only having been appointed by the Grand Jury for the purpose), selected a certain number, and left the rest unconsidered. Held, that such selection did not render the proceedings illegal. Held also, that under that act it is not necessary that all the three magistrates (not being agents,) whose presence was rendered necessary at the sessions, should be resident in the county. *Co. Armagh Presentments.* 141
5. Held, that the Grand Jury had no power at the assizes to make presentments upon applications which had not been laid before the magistrates at the special sessions next before those assizes, under the 59 Geo. III. c. 84. *Co. Tyrone Presentment.* 145
6. Applications for presentments cannot be legally made after the precise day appointed by the Grand Jury for holding the sessions, where there has been no meeting on, or adjournment from, that day. *Co. Tyrone Presentment.* 147
7. Held, that a presentment for the repayment of money advanced by the Lord Lieutenant out of the Consolidated Fund, under the 58 Geo. III. c. 47, and 2 Wm. IV. c. 9, to the Boards of Health established in different districts of a county, should be raised off the county at large, and not off the respective districts. *Mayo Presentment.* 171
8. Held that the 6 Geo. IV. c. 101, s. 5, and the 1 & 2 Wm. IV. c. 33, s. 107, as to presentments by Grand Juries of sums equal to those advanced out of the Consolidated Fund for the repair of roads, were imperative upon the Grand Jury. *Roscommon Presentments.* 172
9. A presentment in the form of a general authority to the treasurer to make advances to contractors in every case where the sum should exceed £20, held not to be warranted by the 3 & 4 W. IV. c. 78, s. 49, (6 & 7 Wm. IV. c. 116, s. 128.) *Co. Wicklow Presentment.* 191
10. Where the magistrates at sessions left blanks in some of the numbers in the schedule relating to presentments for coroners, on account of doubts which they felt as to the sums to be inserted; Held, that it was competent to the Grand Jury to fill up these blanks, after having been advised by the Judge; notwithstanding the 6 & 7 Wm. IV. c. 116, s. 47. *Cavan Presentment.* 211
11. The construction of the 6 & 7 Wm. IV. c. 116, s. 1, is, that no presentment can be lawful unless authorized by an enactment, or an express exception, in that statute. *Cavan Presentment.* 216
12. Where an application for a public work (a bridge) had been brought forward at presentment sessions by two cess payers, and being rejected there, was brought before the Judge of Assize, under the 6 & 7 Wm. IV. c. 116, s. 18; Held, first, that the Judge was not at liberty to direct the Grand Jury to make such a presentment, without causing a petit jury to be impannelled; secondly, that the Judge was bound to cause a petit jury to be impannelled upon a proper memorial being preferred, and the requisites under the statute performed: and thirdly, that the Judge had, after a verdict for the applicant, a discretion to direct the Grand Jury to consider the case or not. *Westmeath Presentment.* 295
13. Where after the division of a

county into two ridings by proclamation under the 6 & 7 Wm. IV. c. 116, s. 176, presentments for the north riding, founded on contracts entered into after the division, were by mistake passed at the assizes for the south riding; held, that the Judge of Assize had no power to rectify the mistake by ordering the presentments to be levied on the north riding. *Tipperary Presentment.* 310

And see the different heads.

PRINCIPAL AND ACCESSARY

See POISONING, 2.

PRINTING.

A contract to perform the printing work of a county for one year is warranted by the 6 & 7 Wm. IV. c. 116, s. 47. *Tipperary Presentment.* 254

PRISON.

See GAOL, MEDICAL OFFICERS.

PRIVILEGED COMMUNICATION.

On the trial of an indictment for forging an accountable receipt, a witness proved that the prisoner, with whose family he had been acquainted, had handed him the document, and requested him to institute proceedings upon it; this the witness refused to do, but kept the document, and delivered it to a third person to be shown to the party whose name was forged; after which the witness returned it to the prisoner. The prisoner being convicted, held, that the conviction was wrong, on the ground that the communication between the witness and the defendant was privileged. *Regina* v. *Donagher.* 241.

PROMISSORY NOTES.

Where a statute made the stealing of a promissory note larceny, and a subsequent statute provided for the punishment of receivers of stolen "goods or chattels;" Held, that promissory notes were "goods," within the meaning of the latter Act. *Rex* v. *Crone.* 47

PROSECUTORS.

1. The Clerk of the Crown is not of right entitled to the fees of 2*s.* 2*d.* & 6*s.* 8*d.* for searches in the Crown office, and copies of informations, as part of the expenses of prosecution under a Judge's order, unless in cases where the copies were actually furnished, and were necessary. *In re Prosecutors' Expenses, Leinster Circuit.* 41
2. The Judge has a discretion in ordering the expenses of prosecutors to be paid to them. *Ibid.*

Where the bills are ignored, no order can be made for a prosecutor's expenses, under 55 Geo. III. c. 91, s. 1. *Prosecutors' Expenses, Co. Kilkenny.* 42

RECEIVER.

1. The receiver of a stolen promissory note was indicted for a substantive felony under the 9 Geo. IV. c. 55, s. 47, and a witness for the crown proved that he (witness,) had stolen the note; but it appeared on his cross examination that he had been tried for the larceny and acquitted, a fact of which the Judge had judicial knowledge. Held, that the acquittal of the principal was not conclusive evidence of his innocence, but that the Judge was right in leaving to the jury the fact of the acquittal, together with the witness's averment of the theft. *Rex* v. *M'Cue.* 120
2. An indictment for receiving stolen pigs in Londonderry is supported by evidence that the pigs were first brought to the prisoner in Donegal, and afterwards sold by him, slaughtered, in Londonderry. *Rex* v. *Connor.* 150

REPLEVIN.

See CIVIL BILL.

RESERVED CASES.

1. Reserved crown cases are to be argued by one counsel on each side, when the Judge who tried the case below and reserved it, shall desire it. 1
2. Held, that the opinion of the majority of the Judges upon cases reserved from circuit is binding upon the individual Judges, whatever their own opinion may be. *Decisions on Reserved Cases.* 234

RIOT.

A notice posted in a public place, and in the following terms: "Mr. B. take notice that Terry and his men will pay you a visit in ten days. I would recommend the Geraghtys of Killigenan to lower the con acre rent, or I will write to his Excellency;" signed, "Terry and his mother;" is not in itself a notice tending to excite a *riot* or *tumultuous meeting*, or an *unlawful combination*, or *confederacy*, under 27 Geo. III. c. 15, s. 9. *Rex* v. *M'Dermod.* 118

ROADS.

1. The passing of a presentment is *primâ facie* evidence of the legality of proceedings under the 59 Geo. III. c. 84, on the part of a person who has obtained a road presentment. *Queen's Co. Presentment.* 40
2. Held, that in consequence of the 6 and 7 Wm. IV. c. 116, the Grand Jury had no power to make a presentment for the expenses of repairing a turnpike road in Tipperary, under the 3 & 4 Wm. IV. c. 112, s. 92, where the application for that purpose had been disallowed at the sessions. *Tipperary Presentment.* 307

See TRAVERSE, 2, 4.

ROBBERY

1. The prisoner was convicted on an indictment purporting to be for highway robbery, but omitting the words as to *taking from the person* of the prosecutor. *Held*, that this was a bad conviction for highway robbery, but good for larceny. *Rex* v. *Rogan.* 62
2. Where husband and wife are both concerned in a highway robbery, the presence of the husband at the commission of the offence is only presumptive evidence of coercion exercised by him over the wife. *Semble*, that in a case of highway robbery, coercion by the husband is not a defence for the wife. *Rex* v. *Stapleton.* 93
3. Held, that petitions for compensation for losses sustained by highway robbery were not within the 3 & 4 Wm. IV. c. 78, s. 70. *Robbery Petition.* 202

See LETTERS.

ROGUE AND VAGABOND.

Proceedings against a person delivering himself up as a deserter, under the Mutiny Act, as a "rogue and vagabond." *Rex* v. *M'Clusky.* 162

SENESCHAL.

See MANOR COURT.

SENTENCE.

1. On a conviction for administering an unlawful oath, the prisoner may be sentenced to hard labour and imprisonment, by virtue of the 51 Geo. 3, c. 63, s. 2. *Rex* v. *Noonan.* 108.
2. Where the Judge omitted, in pronouncing sentence on a conviction for murder, to order that the bodies of the prisoners should be buried within the precincts of the gaol, as directed by the 4 & 5 Wm. IV. c. 26, s. 2; but on a subsequent day, on ruling the book at the close of the same assizes, in the absence of

the prisoners, ordered the clause in question to be inserted. Held, that the sentence was illegal, notwithstanding the 6 & 7 Wm. IV. c. 30, s. 2. *Regina* v. *Hartnett and Casey.* 302.

SERVANT.

See EMBEZZLEMENT.

SHANNON COMMISSION.

A certificate of the Shannon Navigation Commissioners ascertaining the sums repayable by a county, under 2 & 3 Vict. c. 61, s. 64, is not defective for stating that a particular sum is to be levied off one Barony, and for being silent as to the proportions to be levied off the other Baronies; and the Judge of Assize is authorized upon the refusal of the Grand Jury to present in pursuance of such a certificate, to make an order under section 65, directing the specific sum to be levied off that one Barony, and the residue rateably off the other Baronies. *Mayo Presentment, Shannon Commission.* 323.

SHEEP STEALING.

An indictment for stealing sheep is supported by evidence of stealing ewes. *Regina* v. *Barran and Murphy.* 245.

SHERIFF.

See ADJOURNED ASSIZES.

SHOOTING AT.

1. The prisoner was convicted upon two indictments, one for shooting at A. with intent to kill him, and the other for shooting at B. with intent to kill him; the Jury finding that he intended to kill whichever the shot should strike, but not both. Held, that he was rightly convicted. *Rex* v. *Larkin.* 60.

2. An indictment charged the prisoner with shooting at M. B. with intent to maim and disable him, stating in one count that the gun was loaded with gun powder and leaden slugs, and in another count with gun powder and leaden shot. There was no evidence that any ball, slug, or shot had been found, or any wound inflicted; nor was it shown in what manner the gun had been loaded. The Judge told the Jury it was not necessary that they should be satisfied that the gun was loaded with slugs or shot, but that if they believed it was loaded with any substance calculated to act like slugs or shot, it was sufficient; and he left the case to the Jury, to say upon the circumstantial evidence whether it was so loaded. The Jury found the prisoner guilty. Held, that the conviction was right. *Regina* v. *Brady.* 257.

SOLDIER.

See PERSONATING.

SPECIAL COMMISSION.

1. A Commission to the going Judge of Assize for the trial of Admiralty offences, under the 23 & 24 Geo. III. c. 14, s. 4, is not a *Special Commission* within the meaning of the 4 Geo. IV. c. 43, s. 3. (6 & 7 Wm. IV. c. 116, s. 113.) *Cork Presentment.* 97.

2. Where on a trial at a Special Commission, the Jury could not agree, and after remaining a long time shut up, were discharged by the Court (no consent being given by the counsel on either side,) in consequence of the physician's report that a longer confinement would endanger the lives of some of them. Held, that they were properly so discharged, and that the prisoners were triable again; and that they might have been tried at the same Commission, if the Judge had thought proper. *Rex* v. *Barrett.* 103

SPECIAL SESSIONS.

1. The Magistrates at Special Sessions under the 59 Geo. III. c. 84, not having sufficient time to consider all the Presentments, (one day only having been appointed by the Grand Jury for the purpose,) selected a certain number and left the rest unconsidered. Held, that such selection did not render the proceedings illegal. Held also, that under that Act it is not necessary that all the three Magistrates (not being agents) whose presence was rendered necessary at the sessions should be resident in the county. *Armagh Presentments.* 141
2. Held, that the Grand Jury had no power at the Assizes to make Presentments upon applications which had not been laid before the Magistrates at the Special Sessions next before those Assizes, under the 59 Geo. III. c. 84. *Tyrone Presentments, Strabane.* 154
3. Applications for Presentments cannot be legally made after the precise day appointed by the Grand Jury for holding the Sessions, where there has been no meeting on, or adjournment from, that day. *Co. Tyrone Presentments, Dungannon.* 147

SURGEONS.

See MEDICAL OFFICERS.

SURVEYOR.

Held, that where a County Surveyor had been appointed only two months before the Assizes, the Grand Jury were not bound to present for a full moiety of his salary, or a full moiety of the expenses of his office and clerk under ss. 39 & 41 of the 3 & 4 Wm. 4, c. 78. Held also—that even if the moiety ought to have been presented by a former Grand Jury, a subsequent Grand Jury could not rectify the mistake. *King's County Presentment.* 176

TRAVERSE.

1. Where a Presentment was made, without being traversed, of a certain sum to be paid by instalments, and at the next Assizes a Presentment was made of one of these instalments; Held, that a traverse did not lie to the latter Presentment. *Co. Down Presentments.* 20
2. Held, that the notice of traverses directed to be given by the 3 & 4 Wm. IV. c. 78, s. 55, previous to the commencement of the Assizes should be given previous to the swearing of the Grand Jury for fiscal business. Such traverse, when entered too late at one Assizes, cannot be tried at the next. *Co. Kilkenny Presentment.* 192
3. A Fee to the Judge's Crier, upon the entry of each road traverse for damages, is legal, notwithstanding the 6 & 7 Wm. IV. c. 116, s. 110. *Quære* as to the legality of a Fee to the Clerk of the Crown under the same circumstances. *Clare Presentment.* 272
4. The two days' notice of a road traverse for inutility required by the 133rd section of the 6 & 7 Wm. IV. c. 116, means a notice within two days of the First Sessions at which the application for the road was approved under sec. 27 of that Act, and not within two days of the Sessions after the Assizes, under s. 28. *Fermanagh Presentment.* 322

See COURT HOUSE, 2.

TREASURER.

1. Where the Treasurer of a County proved a defaulter to Government in the repayment of advances made by the Government to the County, (the amount of which had been presented by the Grand Jury, raised, and paid into the Treasurer's hands,) and, after the Government had sued him and his sureties upon their recognizances, there still remained a balance

due ; Held, that the Grand Jury were not bound to present for the deficiency, under s. 145 of the 6 & 7 Wm. IV. c. 116, and that the Judge on their refusal was not bound to make an order under s. 179 of that Act.—Semble, that the Crown is not within s. 145 of the 6 & 7 Wm. IV. c. 116. *Tyrone Presentment.* 224

2. A Collector of Grand Jury Cess having proved a defaulter, the Grand Jury sued the Treasurer in the Court of Exchequer, where the Court gave judgment for the defendant, holding that it was the duty of the Grand Jury, and not of the Treasurer, to take care that the Collector should give sufficient security. The Grand Jury afterwards made a Presentment for the deficient sum, to be levied off the County, and paid to the Treasurer, he having debited himself conditionally with that amount. Held, that the Presentment was legal. *Queen's County Presentment.* 231

TRIAL.

After the prisoner had been given in charge, it appeared that the prosecutrix, a child of four years of age, did not sufficiently understand the nature of an oath; and it was admitted on the part of the Crown, that there was no other evidence to sustain the case. Held, that the prisoner was entitled to an acquittal. *Regina v. Oulaghan.* 270

UNLAWFUL OATHS.

1. On a conviction for administering an unlawful oath, the prisoner may be sentenced to hard labour and imprisonment, by virtue of the 51 Geo. III. c. 63, s. 2.—*Quære,* whether to support an indictment under the 50 Geo. III. c. 102, s. 1, for administering an unlawful oath, it must be proved that the country was in a state of disturbance? *Rex v. Noonan.* 108

2. An indictment under the 27 Geo. III. c. 15, s. 6, for administering an unlawful oath, is supported by evidence that the prisoner compelled the prosecutor to swear "that he would give up his land to A. B." *Rex* v. *Adams and Langton.* 135

UTTERING.

1. Where the prisoner was present at a sale of goods by the prosecutor to a third person, (who was introduced by the prisoner to the prosecutor as a purchaser,) and took up a Bank Note given by that person in payment, saying that it was good, and that he would make it good, and desired the prosecutor to write his (prisoner's) name upon it; the note proving a forgery ; Held, that there was sufficient evidence of *uttering* by the prisoner. *Rex* v. *Cushlan.* 113.

2. *Semble,* that reading out a document, although the party refuses to *show* it, is a sufficient uttering. *Regina* v. *Green,* 282.

VAGRANTS.

Held, by eleven Judges, that the Vagrant Acts (6 Ann c. 11, 9 Geo. II. c. 6, 11 & 12 Geo. III. c. 30, and 31 Geo. III. c. 44,) apply to the several counties in Ireland, and not to the county and city of Dublin alone. Held also, by six Judges to five, that those Acts apply to women as well as men. *Meath Presentment.* 289

See DESERTER.

VARIANCE.

1. The informations, warrant of committal, and indictment, stated an offence committed on Monday the 12th. In the course of the trial it became necessary to fix the precise date of the offence, which was proved to be Monday the 5th. Held, that a conviction under these circumstances was legal. *Rex* v. *Jones.* 72

2. An indictment for sending to the Lord Lieutenant a false recommen-

dation of persons convicted, charged that the prisoner forged the signature of "T. King, rector of T." The evidence was, that the name forged by the prisoner was "T. Knox, rector of T." The Judge having given leave to amend, by substituting "Knox" for "King;" Held, that there was no fatal variance on the ground of its appearing in evidence that T. Knox was in fact rector of A., and that there was no such parish as that of T. Held, also, that proof of the document which contained the false recommendation being in the prisoner's hand-writing, and dated in the county in which the venue was laid, was sufficient evidence of acts done in that county. *Rex* v. *Dwyer.* 198

VENUE.

See ABDUCTION.

WARRANT.

See MANSLAUGHTER, 2.

WEIGHTS AND MEASURES.

Held, that the 6th and 7th sections of 4 & 5 Wm. IV. c. 49, (weights and measures,) were imperative. *Kildare Presentment.* 174

WHITEBOY.

1. An indictment under the 27th Geo. III. c. 15, s. 10, will be sustained by evidence of supplying ammunition to a person who only pretended to get it for the use of the Whiteboys. *Rex* v. *Heffernan.* 2
2. An indictment under the Whiteboy Act for an injury to a gatehouse, stating it to be the "dwelling-house and habitation" of the gatekeeper, is sufficient. *Rex* v. *Cahill.* 36
3. Evidence to support an indictment under the Whiteboy Act. *Rex* v. *Carroll.* 78

It is not necessary to prove, by distinct evidence, that the country was in a state of disturbance, if the crime itself be clearly a Whiteboy offence, as the circumstances attending it may demonstrate the country to be in such a state. *Ibid.*

4. An indictment, charging that the prisoner did, "by threats and menaces, threaten violence to the person of one J. G. in the event of his not taking back into his employment a certain man whom he had then lately before discharged from his service," is bad. Such an indictment, supposing it were good, is not supported by evidence that J. G. was agent to another person, and hired servants to be employed about the work of that person, which J. G. superintended; and that the discharge of one of these servants was the occasion of the threats stated in the indictment. *Rex* v. *Flannery.* 243

See RIOT.

WITNESS.

1. A man jointly indicted with others, and who has pleaded not guilty, cannot be a witness for the prosecution, whilst his plea stands. *Rex* v. *Ryan.* 5
2. The prosecutor's wife is a competent witness for the defence. *Rex* v. *Houlton.* 24
3. It is no objection to the testimony of a wife, that she is brought to contradict the testimony of her husband. *Ibid.*
4. Where a witness was called by the Crown, and the Crown declined to examine him, but permitted him to be cross examined, and then re-examined him, and then produced his depositions to show that what he had therein stated varied from his evidence at the trial; Held, that a conviction under these circumstances was wrong. *Rex* v. *Moran.* 91
5. Where a witness, after having been examined for the prosecution, fainted shortly after the commencement of his cross-examination, so as to render it impossible for him to give any further evidence; held, by seven Judges against five, that a conviction

upon such evidence as had been already given by this witness, taken together with the evidence of the other witnesses, was good. *Rex* v. *Doolin*. 123

See MEDICAL WITNESS

YACHT.

The owner of a yacht is not entitled to compensation for the malicious burning of it, under the 19 & 20 Geo. III. c. 37. *Galway Presentment*. 71

THE END.

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